SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73 1402

KEVIN JAMES KEKOA, a minor, by CATHERINE KEKOA ENOMOTO, his next friend; JAMES KAHIKINA AKAKA, a minor, by JOSEPH KAHIKINA AKAKA, his next friend; KAYLIA KAHELE, NOENOE LOREN KAHELE and WILLIAM KAHELE, all minors, by LOUISE G. KAHELE, their legal guardian and next friend; MARMIONETT MAGOON KAOWILI; and AD HOC COMMITTEE FOR A HAWAIIAN TRUSTEE; THE FRIENDS OF KAMEHAMEHA SCHOOLS AND THE BERNICE PAUAHI BISHOP ESTATE,

Petitioners,

v.

WILLIAM S. RICHARDSON, MASAJI MARUMOTO, KAZUHISA ABE, BERNARD H. LEVINSON, and BERT T. KOBAYASHI, individually and in their capacity as JUSTICES of the SUPREME COURT OF HAWAII; FRANK ELBERT MIDKIFF, RICHARD LYMAN, JR., HUNG WO CHING and MATSUO TAKABUKI, individually and in their capacity as TRUSTEES of the BERNICE PAUAHI BISHOP ESTATE TRUST; GEORGE T.H. PAI, individually and in his capacity as ATTORNEY GENERAL of the STATE of HAWAII,

Respondents.

CONTINUED ON REVERSE SIDE

IN THE MATTER OF THE ESTATE OF
BERNICE PAUAHI BISHOP, DECEASED

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

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Respondents.

CONTINUED ON PAGE 2

IN THE MATTER OF THE ESTATE OF
BERNICE PAUAHI BISHOP, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE HAWAII SUPREME COURT

The Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Hawaii entered in this proceeding on December 17, 1973.

OPINIONS BELOW

The two opinions of the Supreme Court of the State of Hawaii in this matter, the first dated October 1, 1971 and the second dated November 28, 1973 are appended as Appendix "A" and "B" respectively. The order of the Supreme Court of Hawaii of June 18, 1971 appointing Matsuo Takabuki as Trustee of the Estate of Bernice P. Bishop, Deceased, is Exhibit 1 to the Amended Complaint appended hereto as Appendix "C". The vesting order of the Circuit Court of the First Circuit of the State of Hawaii of July 30, 1971 is appended herewith as Appendix "D".

JURISDICTION

The final judgment of the Supreme Court of the State of Hawaii in this matter was entered on December 17, 1973. This petition was timely filed within ninety (90) days of such final judgment. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

I

Whether the process of appointment of a successor trustee of the Estate of Bernice P. Bishop is so entwined with state involvement that the constitutional restraints are applicable?

II

If the appointment process is subject to constitutional restraints, whether Petitioners, who are the beneficiaries of the Estate, were denied due process when a requested hearing was denied by the Respondents?

III

Whether the Petitioners were denied due process when one of the Respondents chose the judges to review the respondents' conduct, particularly when that same Respondent is the administrative superior of those same judges?

STATEMENT OF THE CASE

This petition concerns a dispute over the appointment of a successor trustee of the Bishop Estate. Bernice Pauahi Bishop was the wife of Charles Reed Bishop and the great-granddaughter of Kamehameha I, founder of the Hawaiian monarchy. At her death in 1884, as the last of the descendants of Kamehameha, she held title to a vast share of the lands of the Kingdom.* By her will, she

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*Originally Kamehameha I held title to all land in the Hawaiian Islands. In 1848, his descendant Kamehameha III promulgated the "Great Mahele" ('Great Division'), by which he gave a portion of the lands to the chiefs underneath him and retained a portion of

devised all those lands to a perpetual charitable trust, the income and corpus of which was to be used for the education of the people of Hawaii. Under the terms of the will, the relevant paragraphs of which are hereto appended as Appendix "F", two schools–one for boys and one for girls–were to be erected and maintained. A portion of each year's income was to be devoted to the support and education of orphans and indigents, with preference for Hawaiians of pure or part aboriginal blood. Article Fourteen of the Will provided as follows:

> I further direct that the number of my said trustees shall be kept at five; and that vacancies shall be filled by the choice of a majority of the Justices of the Supreme Court, the selection to be made from persons of the Protestant religion.

In the usual course of events under this paragraph, the trustees of the Bishop Trust notify the Justices of the Supreme Court of the death or resignation of one of the trustees. In *Estate of Bishop*, 23 Hawaii 575 (1917), *aff'd*, 250 F.2d 145 (9th Cir. 1918), it was determined that the Justices of the Supreme Court then sit as "individuals" to select a successor. In making the selection, the Justices apparently are on their own; any outside assistance, if sought or received, is done *sua*

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the lands for the support of his household. By devise from her parents and other royal relations, Bernice Pauahi Bishop had acquired title to nearly 380,000 acres of this royal land when she created the perpetual charitable trust in her will. Both its origin and the uses to which she dedicated it have caused the land of the Estate to become regarded by the native Hawaiians and part-Hawaiians as indigenous of their heritage. *See generally* F. Midkiff, "The Kamehameha Schools and the Bishop Estate," published in *Aspects of Hawaiian Life and Environment*, 161-194 (Honolulu: The Kamehameha Schools Press, 1971).

sponte. There is no formal procedure permitting anyone to place a nomination before the Court for consideration, or to find out who is being considered; and there are no formal guidelines as to the qualifications a trustee should have. Upon making a decision, the Justices sign a document attesting to the appointment under the seal of the Supreme Court. It is stamped "filed" by the clerk and placed in a special unnumbered file becoming part of the public record of the Supreme Court. (Eg., Exhibit "1" to Appendix "C".)

Upon notification that an appointment has been made by the Justices, the remaining trustees file a petition in the First Circuit Court of the State of Hawaii requesting that court to enter an order vesting title in the trust corpus in the name of all trustees including the newly appointed trustee. (See H.R.S., §554-1, quoted in Appendix "E"). Under the opinion of *Estate of Bishop, supra*, the act of the Circuit Court Judge in vesting title is ministerial: his only function is to determine if the appointment is correct in form, to set the amount of the appointee's bond and to enter an order vesting title to the corpus pursuant to the Supreme Court Justices' appointment.

When Bernice Pauahi Bishop died in 1884, the justices of the Supreme Court designated in Article Fourteen of her will were appointees of her uncles, the Kings of Hawaii. By 1971, when Bishop Estate Trustee Herbert Keppeler died, the same Supreme Court was a coordinate branch of the government of the State of Hawaii. The corpus of the Bishop Estate Trust by then comprised approximately 370,000 acres, or approximately one-eleventh of the total land area of the State, with a value of close to half a billion dollars. Within three weeks of the death of Trustee Keppeler, an organization named "The Hawaiians" (one of the original plaintiffs, but not a

party to this petition) wrote to the Chief Justice of the Supreme Court of Hawaii, the respondent Hon. William S. Richardson, requesting an opportunity to participate in the selection process. (See Exhibit 2 to the Amended Complaint, Appendix "C"). The specific requests of The Hawaiians were refused; instead, the Chief Justice invited them to submit a list of suggested qualifications and candidates who would fit them. (Exhibit 3 to Appendix "C"). Six weeks later, without any hearing having been held, the Justices of the Supreme Court on June 18, 1971, appointed Matsuo Takabuki to the post. Statements made by the respondents to the newspapers at the time indicated that Mr. Takabuki had been required by the Justices to divest himself of undisclosed financial interests felt to be in conflict with the position of Trustee. (Exhibits 4, 6 and 7 to Appendix "C"). Since the next step in the appointment process was to secure an order vesting title in Mr. Takabuki, Petitioners wrote to the Attorney General of the State of Hawaii requesting him in his capacity as representative of the public interest in charitable trusts to ask the Circuit Court for time to make a "full, public investigation of all of Mr. Takabuki's financial and personal relations that may have any bearing on his ability to serve the trust disinterestedly. . ." (Exhibit 10 to Appendix "C"). This request was denied by the Acting Attorney General in a personal interview with agents for Petitioners on July 29, 1971, again on the authority of *Estate of Bishop, supra.* (Exhibits 12 and 13 to Appendix "C").

Petitioners, as beneficiaries of the Estate, had filed suit on July 22, 1971 seeking a preliminary injunction against Mr. Takabuki's appointment and a determination that the appointment was defective on various legal grounds. Simultaneously, Petitioners moved to intervene in the vesting proceedings in equity in order to seek a review of

the appointment. The two actions were consolidated. The Circuit Court judge, observing that he was bound by the holding in *Estate of Bishop, supra*, dismissed the complaint for failure to state a claim upon which relief could be granted, and for failure to join an indispensable party. The court also denied the motion to intervene in the vesting proceeding. An amended complaint was filed to cure the joinder issue, but it in turn was ordered stricken. Petitioners appealed to the Supreme Court, whose Justices were named as defendants in the proceedings. There Petitioners moved to disqualify the defendant Justices (in *Estate of Bishop, supra*, the Justices making the challenged appointment had upheld its validity without considering it necessary to recuse themselves) and for entry of an order providing for selection of substitute Justices by lot. The defendant Justices recused themselves, but entered an opinion denying the motion for selection by lot and announcing the designations by the Chief Justice of five Circuit Court judges to sit as replacements. *Kekoa v. Supreme Court of Hawaii*, 53 Hawaii 174, 488 P.2d 1406 (1971), reproduced in Appendix "A". The five judges so sitting entered an opinion on November 28, 1973 affirming dismissal of the original and amended complaints for failure to state a claim upon which relief could be granted. From the judgment, dated December 17, 1973, entered on those decisions, Petitioners bring this request for writ of certiorari to issue from this Honorable Court.

I.

THE DUE PROCESS REQUIREMENTS OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA APPLY TO THE PRESENT METHOD OF DESIGNATING SUCCESSOR TRUSTEES UNDER THE WILL AND OF THE ESTATE OF BERNICE PAUAHI BISHOP, DECEASED.

A. Under the Will of Bernice Pauahi Bishop, the Justices of the Supreme Court of Hawaii designate successor trustees of the Bishop Estate.

Article Fourteenth of the Will of Bernice P. Bishop states that trustee vacancies "shall be filled by the choice of a majority of the Justices of the Supreme Court [of the Kingdom of Hawaii]." (Appendix "F"). The respondents, the Justices of the Supreme Court of the State of Hawaii designated and appointed Matsuo Takabuki a trustee. (Appendix "B"). Although a hearing was requested, the Chief Justice of the Hawaii Supreme Court denied that request indicating that the "court" did not operate in that manner. (Appendix "C"). Respondents below alleged and argued that because of state involvement in the appointive process and the administration of the Bishop Estate, a due process hearing was required before the appointment was made.

B. State involvement in the Bishop Estate constitutes state action.

No list of citations is necessary to conclude that "private" conduct is not subject to State or Federal constitutional restraints. *Civil Rights Cases*, 109 U.S. 3 (1883). "State action", one of the most elusive concepts of constitutional law, must be shown. In determining

state action this Court stated in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) that courts must sift facts and weigh circumstances to determine the degree of "non-obvious involvement of the State in private conduct . . . ." Moreover, "to fashion and apply a precise formula for recognition of state responsibility . . . is an 'impossible task' which 'This Court has never attempted.' " More recently in *Evans v. Newton*, 382 U.S. 296 (1966) this Court has said:

> What is "private" action and what is "state" action is not always easy to determine. [Citations omitted]. Conduct that is formally "private" may become so entwined with government policy or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action. (*Id.* at 299).

It is therefore apparent the operation of the Bishop Estate and particularly its appointive process should be examined in detail to determine the degree of "non-obvious involvement" of the state.

Consider these "non-obvious involvements".

First, the state judiciary has taken a pre-eminent role in the supervision of the Bishop Estate. The appointment of the trustee is made by the Justices of the Supreme Court of the State of Hawaii. To call the appointment individual action, as the Respondents would argue, fails to recognize these salient points. The "individuals" who pick the successor trustee are identified solely by their positions as state officials; these state officials act by a majority vote and control who will ultimately become a successor trustee; the Will of Bernice Pauahi Bishop makes it quite clear that she wanted persons who were state officials (and only while they served as such) deeply

involved in the appointive process. It was William S. Richardson, Masaji Marumoto, Kazuhiza Abe, Bernard A. Levinson and Bert T. Kobayashi as occupiers of the office of Justice of the Hawaii Supreme Court who could and did make the appointment of Matsuo Takabuki, not those persons as individuals. Without their status as state officials those persons could not act in making the appointment.

The courts elsewhere have had no difficulty in seeing through the veil of so-called "private conduct". Thus, in *Guillory v. Administrators of Tulane University*, 212 F. Supp. 674 (E.D. La., 1962), the court without hesitation said: "Were the Tulane Board [of Governors] made up solely of state officers, without doubt there would be state action". (*Id.* at 683). (In Tulane's case only three of the seventeen members of the Tulane Board of Governors were public officials, and thus no state action was found). So too the administration of a trust by city officials was found to be state action in *Pennsylvania v. Board of Trusts*, 353 U.S. 230 (1957) (the well known *Girard College* case), and the action of a city in serving as a trustee of a "private" park was also found to be state action in *Evans v. Newton, supra.*

Just because the officials are part of the judiciary makes no difference. Thus, *Shelly v. Kraemer*, 334 U.S. 1 (1948), and *Barrows v. Jackson*, 346 U.S. 249 (1953) hold that enforcement of racially restrictive covenants by the courts would be impermissible state action.

Secondly, the very appointment here in question is replete with indicia of judicial-state involvement of the Justices of the Supreme Court. It would appear to the objective observer that in fact a judicial act had occurred. Consider these facts:

The appointment of the trustees was made in the form of a court order (Appendix "C"); the appointment

document was impressed with the Court seal (Appendix "C"); the appointing document was stamped "filed" by the Clerk of the Supreme Court (Appendix "C"); and the Chief Justice of the court in reply to an inquiry regarding a hearing, stated that the "court" did not act in the manner suggested (Appendix "C"). No third party examining this appointment could help but think that the Hawaii Supreme Court had made the appointment.

State action includes not only actual state involvement, but the appearance of participation of the state. See *Commonwealth of Pennsylvania v. Brown*, 270 F. Supp. 782, 789 (E.D. Pa. 1967); *aff'd*, 392 F.2d 120 (3rd Cir. 1968), *cert den.* 391 U.S. 921 (1968); *In re Richardson*, 247 N.Y. 401, 419-423 (1928), 160 N.E. 655, 661-662 (1928). The reason for this policy is obvious. The public is going to expect that if the action appears to be state action, then the constitutional limitations are going to be applied. If these limitations are not applied, the public will become distrusting of governmental officials, particularly when the apparent acts of those government officials conflict with constitutional prerequisites and known standards of fairness.

Thirdly, a number of other state action indicia were present. These factors include:

(1) The ruling of the *Estate of Bishop*, 23 Haw. 575 (1917), aff'd, 250 Fed. 145 (9th Cir. 1918), that the appointment by the Justices is non-reviewable by the circuit court.

The ruling in the case of *Estate of Bishop, supra*, states that the appointment by the Justices is a private act of each individual Justice. Thr trial court, in dismissing the respondents complaint, indicated that it had no discretion in the matter and the appointment was non-reviewable based upon *Estate of Bishop, supra.*

On the basis of *Estate of Bishop, supra*, the Hawaii Supreme Court would appear to be saying that the appointment is a judicial act of the Hawaii Supreme Court, and therefore non-reviewable by any lower court. In other words, the Justices of the Hawaii Supreme Court have mounted themselves on a pedestal higher than a normal appointing agency for choosing a successor trustee.

In a normal appointment of a successor trustee the Hawaii Circuit Court could choose not to vest title in the appointed successor. *Hawaii Revised Statutes* §554-1 (1968) provides in part:

> *Vesting Title to Trust Estates.* In the case of the valid appointment or succession of any trustee to fill a vacancy in any trusteeship. . . any circuit judge setting in equity at chambers. . *.may* make a vesting order which shall vest the legal title in and to the trust property. . . (emphasis added).

Clearly this gives the circuit court judge discretion in the granting of a vesting order. Without this statute under common law doctrines it was extremely difficult for a court of equity to vest title in a successor trustee. Technically the heirs of the deceased trustee would have to pass title to the successor. These problems were alleviated with the passage of statutes like §554-1, and this statute was undoubtedly utilized in vesting title in Matsuo Takabuko. If it were not used, his appointment would be subject to doubt. Presumably therefore, in a *normal* appointment the equity court could choose not to vest title. By making the appointment of a successor trustee to the Bishop Estate non-reviewable and non-discretionary, the Hawaii Supreme Court in the *Estate of Bishop* case, *supra*, has thus made the appointment an official act of the court.

(2) The general supervision and control of the Bishop Estate by state agencies is extensive and complete.

Each year the Bishop Estate financial and other transactions are reviewed by the Equity Court of the State of Hawaii. (Estate of Bishop, 53 Haw. 604, 499 P.2d 670 (1972)). The annual reports by masters appointed by the court are oftentimes elaborate documents digging deeply into the details of transactions. The Equity Court, in recent years, has been known to take an active role in the management of the Estate. (*Midkiff v. Kobayashi*, 54 Haw. 299, 507 P.2d 724 (1973)).

In a similar situation, the court in the *Girard College* decision thought it significant that the Pennsylvania Legislature received reports regarding the operations of the college, and that the Orphans' Court had demanded periodic accountings. *Commonwealth of Pennsylvania v. Brown, supra.* The District Court went on to hold that the "private" college was in fact subject to constitutional restraints.

(3) The Bishop Estate has been carrying on a state function since its inception.

The operation of one or more shcools has been the essential function of the Bishop Estate. The operation of an enterprise normally public does not alone command the adherence to constitutional restraints; but it is an important consideration in determining "non-obvious involvement".

Thus, in *Terry v. Adams*, 345 U.S. 461 (1953) this Court held that a "private" political organization could not exclude blacks from the nomination process where these processes invariably determined the official Democratic Party representatives. Three Justices felt that the organization's performance of a governmental function (holding elections) made its conduct state action. In *Evans v. Newton, supra* this Court considered it signifi-

cant that a park was governmental in function and character in concluding that constitutional restraints applied to the operations of a private park. See also, *Marsh v. Alabama*, 326 U.S. 501 (1946) (application of First Amendment restraints to privately owned town); *Kerr v. Enoch Pratt Free Library*, 149 F.2d 212 (4th Cir. 1945), cert. denied, 326 U.S. 721 (1945) (private library subject to constitutional restraints; "It is generally recognized that the maintenance of a public library is a proper function of the state . . . ." (*Id.* at 217).

No one could reasonably argue that education is not a public function. As the court stated in *Brown v. Board of Education*, 347 U.S. 483 (1954):

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society . . . It is the very foundation of good citizenship . . . . (*Id.* at 493).

(4) The Estate is tax exempt, and thus the state has given preference to it.

The Bishop Estate is tax exempt as to its eleemosynary operations, which effectively amounts to an indirect state subsidy. (Appendix C). This privilege cannot be excused as insignificant for many charitable institutions could not survive without exempt status. The state and its citizens should therefore receive something for their investment—adherence to the minimum constitutional standards of due process. Numerous courts have considered tax exemptions one other indication of non-obvious involvement of state machinery in ostensibly private conduct. See *Eaton v. Grubbs*, 329 F. 2d 710, 715 (4th Cir. 1964); *Kerr v. Enoch Pratt Free Library, supra, Commonwealth*

v. Brown, supra, Farmer v. Moses, 232 F. Supp. 154, 159 (S.D. N.Y. 1964).

(5) The State Attorney General, a state official, claims to have general enforcement powers over the Bishop Estate and the trust is charitable and not subject to the Rule Against Perpetuities.

(6) The Bishop Estate is a unique and highly important institution in the State of Hawaii.

Much like the company town in *Marsh v. Alabama, supra,* the Bishop Estate is a unique institution. It owns or controls 17 percent of all private land in the State of Hawaii and its every movement is of significance to numerous individuals in the State. (See generally, Hawaii Legislative Reference Bureau, *Public Land Policy in Hawaii: Major Landowners* (1967)). Its very size and power make it quasi-governmental in importance. Although it has no semblance of democratic representation in its business operations, it should have minimal responsibility to the standards of the Bill of Rights.

C. State action comes with its constitutional restraints.

The Bishop Estate is under the state's protective umbrella, and the Estate should be subject to the restraints on state action set out in the Federal Constitution. One of these restraints is the application of procedural due process to the appointive process.

II.

THE PROCEDURES FOLLOWED AND ACTIONS TAKEN TOWARD THE APPOINTMENT OF MATSUO TAKABUKI AS A SUCCESSOR TRUSTEE UNDER THE WILL AND OF THE ESTATE OF BERNICE PAUAHI BISHOP, DECEASED, DID NOT MEET THE REQUIREMENTS OF DUE PROCESS.

In view of the elaborate state entanglement in the Bishop Estate and more particularly in the appointive process, Petitioners contend that before the Justices of the Supreme Court made the appointment, they should have notified interested parties, particularly benefactors of Kamehameha Schools, and provided for a meaningful hearing. Instead, the Justices proceeded to do what courts and judges, of all institutions, should not do–carry on decision-making in secret without discussion with interested parties. As a practical consequence the Justices have brought upon themselves what procedural due process was designed to avoid–suspicion and disrespect for a governmental institution because of lack of knowledge about the basis for a decision.

The appointive process is peculiarly susceptible to the application of procedural due process requirements. Of all events surrounding the Bishop Estate the most important is the appointment of a new trustee. The general operation of the trust estate is managed by the Trustees, subject to overall guidance by the Equity Court. A new trustee should be appointed in light of the thoughts and feelings of the beneficiaries and potential beneficiaries of the Estate. That is not to say that a veto power over who should be appointed is to be granted, but only the opportunity to be heard on who should be appointed. Is it asking too much that Justices of the Hawaii Supreme Court meet these normal due process

requirements before making a decision affecting so many individuals?

The Fourteenth Amendment of the United States Constitution commands that no state shall deprive a person of life, liberty or property without due process of law. Procedural due process requires notice and opportunity to be heard.

As this Court recently stated:

> [Procedural] "due process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. . . . whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account. *Jenkins v. McKeithen*, 395 U.S. 411, 427 (1969).

Justice Frankfurter once said about procedural due process:

> The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170 (1951).

This Court has been increasingly questioned on state proceedings or procedures which could affect individuals without giving the citizens the opportunity to be heard. E.g., *Sniadach v. Family Finance Co.*, 395 U.S. 337 (1969) (State provision of remedy of wage attachment without prior hearing in debtor-creditor relationship invalid); *Goldberg v. Kelley*, 397 U.S. 254 (1970) (State

Welfare Department required to provide fair hearings before terminating welfare grants); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (An individual has a right to a prior hearing before a State brands him a public drunk by posting notices in taverns); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (State must provide free access to State courts by waiving filing fees in divorce cases if persons are indigent); *Bell v. Burson*, 402 U.S. 535 (1971) (State provision to protect potential recovery in automobile accident negligence cases through requirement of posting evidence of financial responsibility invalid without a hearing on likelihood of liability); *Board of Regents of State College v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972) (Need for a due process hearing for a terminated employee).

It is fundamental that a deprivation of life, liberty or property must occur before procedural due process requirements must be satisfied. Aside from the obvious equitable interests that beneficiaries have in a trust (i.e., a property interest), the Petitioners also believe that a liberty interest is at stake in the appointment process.

Although the court below felt it was "obvious" that the issues in this case did not involve a denial of liberty without due process of law, Petitioners suggest that such a summary view of the matter is fundamentally inaccurate. The Amended Complaint (Appendix "C") set forth in detail Petitioners contentions concerning the involvement of the highest court of the State in the appointment process, elements which Petitioners contend require a conclusion that "state action" is involved. If this is so, Petitioners case presents the anomaly of the State's highest court denying the beneficiaries of a trust the liberty of any common citizen: the right to participate in the deliberations that affect him. The highest court of a State contends it has the right to conduct

proceedings relative to the appointment of a Bishop Estate Trustee in utmost secrecy, and that it is answerable to no one once the appointment is made. By failing to overrule *Estate of Bishop, supra,* the court below did not correct this extraordinary assertion of power. No court has claimed such prerogatives since the days of the Star Chamber, when of course very different interests were at stake. But the severity of the analogy should not cause one to disparage the fundamental similarity involved: the procedures by which the Star Chamber chose to operate are utterly repugnant to the most elemental concepts of due process.

Petitioners, be it understood, do not contend that due process is denied whenever a trustee is appointed without affording interested parties, including beneficiaries, an opportunity to be heard. (Contrary to the passage in the opinion below that it is "black letter law" that the beneficiaries of a trust have no inherent right to be represented in the appointment of a successor trustee, it has frequently been held that it is an *abuse of discretion* for a court so to proceed. See generally, G. Bogert, *Trusts and Trustees,* §§532, 533 (2d Ed. 1960)). Petitioners contention is the narrower one that whenever the Supreme Court of a state is involved in the appointment procedure, considerations of fundamental fairness and due process require that it adhere to standards applicable to any other court, or coordinate branch of government: that it afford interested parties the opportunity to be heard before it takes action must be subject to review in a court of equity: it cannot rely on the ambiguity of its role and assert that on one hand, its action is that of five individuals, and therefore is not state action subject to due process requirements, while on the other hand it asserts that because it is the Supreme Court that has acted, no other court may review its action.

Needless to say, authority on this point is not to be found in the reports of cases, it is rather found in the language of our Constitution itself. Fear of courts that acted in secret and without proper safeguards led to the passage of the Fifth, Sixth, Seventh and Eighth Amendments. And it is the Hawaiians' concern for their heritage and birthright, a concern that it be dealt with openly and fairly, that has led to this appeal to the only court left open to them. No amount of sophisticated analysis will reveal the "liberty" or "property" which has been denied to Petitioners if the judicial conscience itself is not disturbed by what has happened in this case. The issues in this case penetrate to the deepest wellsprings of our common law, and for that reason, if for no other, this Court should grant certiorari.

III.

RESPONDENT'S FAILURE TO DESIGNATE SUBSTITUTE JUSTICES BY LOT DENIED PETITIONER'S DUE PROCESS.

The Respondents, among others, are the Chief Justice and Justices of the Supreme Court of the State of Hawaii. After the trial court denied Petitioners' claims, an appeal was filed to the Hawaii Supreme Court. The Chief Justice and Justices of that court recused themselves. However, the Chief Justice, instead of appointing substitute Justices by lot as requested by the Petitioners, designated substitute Justices of his own choosing. (See generally, Appendix "A"). All of the appointed substitute Justices were Hawaii circuit court judges.

If the fact that a litigant chose his own judge was not sufficient to deny opposing parties basic due process, the fact that the litigant is also the substituted Justices' immediate superior surely calls for intervention of due

process protections. The Chief Justice of the Hawaii Supreme Court is the administrative head of the judiciary department of the State of Hawaii. In this capacity, aside from other duties, (1) he may assign circuit court judges from one circuit to another, (2) within a circuit with more than one circuit judge, he may make assignments of calendars among the circuit judges and appoint one of the judges as administrative judge to manage the business of the circuit court, and (3) he must review the general budget for the judiciary. *Hawaii Revised Statutes,* §601-2 (1973 Supp.).

It is not necessary that the Petitioners prove that, in fact, the Chief Justice, either directly or indirectly, influenced the outcome the substituted justices' decision. The only true question is whether he *could* influence the court. This is because the conduct of a judge not only must be fair and above doubt, but the conduct must be above any doubt. This Court in *In re Murchison,* 349 U.S. 133 (1955) stated:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. *Id.* at 136.

Or as stated in *Offutt v. United States,* 348 U.S. 11, 14 (1954) "justice must satisfy the appearance of justice." There could be no doubt that no ordinary litigant could be permitted to designate his judge; that feeling is doubly true if that same litigant could pick a friend, business associate, or an employee as his judge. If this were allowed, our system of justice would be a mockery. There is no reason not to apply the same logic to the facts which occurred below.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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March 11, 1974

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of March, 1974, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to WALTER G. CHUCK, Suite 202, 1022 Bethel Street, Honolulu, Hawaii; J. GARNER ANTHONY, 9th Flr., 333 Queen Street, Honolulu, Hawaii; and BERTRAM T. KANBARA, Suite 887, 888 Mililani Street, Honolulu, Hawaii, counsel for Respondents. I further certify that all parties required to be served have been served.

DATED: Honolulu, Hawaii, March _____, 1974.

EDWARD C. KEMPER
ALAN S. HALEY
Attorneys for Petitioners

Appendix A

Opinion of the Court

KEVIN JAMES KEKOA, A Minor, by CATHERINE KEKOA ENOMOTO, His Next Friend, et al., Plaintiffs-Appellants, *v.* SUPREME COURT OF HAWAII, et al., Defendants-Appellees

and

In the Matter of the Estate of BERNICE PAUAHI BISHOP, Deceased

No. 5215

MOTION FOR DISQUALIFICATION OF JUSTICES OF THE SUPREME COURT AND SELECTION OF ALTERNATE JUSTICES

October 1, 1971

RICHARDSON, C.J., MARUMOTO, ABE, LEVINSON AND KOBAYASHI, JJ.

Per Curiam. Appellants have moved for the disqualification of all of the justices of this court from sitting in this case; for the appointment of circuit court judges, who are not disqualified, as substitute justices by drawing of lots; and for the drawing of lots in the presence of all justices and counsel in the case. The grounds for the motion are that the justices are parties in the case and the case involves a challenge to the act of the justices in appointing Matsuo Takabuki as trustee of the Estate of Bernice Pauahi Bishop, Deceased.

Each justice will file a certificate recusing himself from sitting in the case.

In *Re Bouslog*, 41 Haw. 270, 283 (1956), Mr. Justice Stainback suggested that a substitute justice be selected to serve in his stead, stating: "It it [sic] not only important to render a righteous and correct judgment but

that it be done in such a manner that it will beget no suspicion of the fairness and integrity of the judge." Alpheus Thomas Mason's *Harlan Fiske Stone, Pillar of the Law* (1956), pp. 698-720, contains a chapter on the judicial proprieties observed by Chief Justice Stone, where the author refers to correspondence in which the Chief Justice expressed his view that a Supreme Court justice, like Caesar's wife, must be above suspicion, other correspondence in which he stated that the justices declined to sit if they had "anything substantially to do with the case before it reached the Supreme Court," and his testimony at a Congressional hearing that the actions of the justices in so declining to sit constituted recusal rather than disqualification.

Inasmuch as each justice of the court will recuse himself from sitting in this case, we do not reach the question as to whether the justices are legally disqualified.

Upon the filing of such certificates, the appointment of substitute justices will become necessary.

The State Constitution contains a provision which is applicable to this precise situation. Article V, Section 2, provides: "The supreme court shall consist of a chief justice and four associate justices. When necessary, the chief justice shall assign a judge or judges of a circuit court to serve temporarily on the supreme court. * * *"

The constitutional language states a mandate which is clear and unambiguous. There is no provision in the constitution which permits appointment of substitute justices by the drawing of lots. Such being the case, the method of appointment provided in the constitution is controlling. *State v. Anderson*, 53 N.M. 441, 210 P.2d 626 (1949); *State v. Meisinger*, 258 Minn. 297, 103 N.W. 2d 864 (1960).

An order will be entered denying appellants' motion for the appointment of circuit court judges, who are not

disqualified, as substitute justices in this case by the drawing of lots.

Samuel P. King for plaintiffs-appellants, for the motion.

Bertram T. Kanbara, Special Deputy Attorney General, for defendant-appellee, George T. H. Pai, contra.

Appendix B

Syllabus

KEVIN JAMES KEKOA, a Minor, by CATHERINE KEKOA ENOMOTO, His Next Friend, et al., Plaintiffs-Appellants, *v.* SUPREME COURT OF HAWAII, et al., Defendants-Appellees

In the Matter of the Estate of
BERNICE PAUAHI BISHOP, Deceased

NO. 5215

APPEALS FROM FIRST CIRCUIT COURT
HONORABLE YASUTAKA FUKUSHIMA, JUDGE

NOVEMBER 28, 1973

CIRCUIT JUDGE ALLEN R. HAWKINS, Presiding Justice, in place of RICHARDSON, C.J., recused CIRCUIT JUDGE THOMAS S. OGATA in place of MARUMOTO, J., recused, CIRCUIT JUDGE ALFRED LAURETA in place of ABE, J., recused, CIRCUIT JUDGE HERMAN T. F. LUM in place of LEVINSON, J., recused, and CIRCUIT JUDGE JOHN C. LANHAM in place of KOBAYASHI, J., recused.

* * * * *

Per Curiam. On June 18, 1971, the Justices of the Supreme Court of Hawaii, acting pursuant to the provisions of the fourteenth article of the will of Bernice Pauahi Bishop, appointed Matsuo Takabuki as trustee of

the Bernice Pauahi Bishop Estate trust in order to fill a vacancy created by the death of trustee Herbert K. Keppeler. The relevant portion of the fourteenth article of the will, under which the Justices acted, and concerning which the appellants present several issues of law, is as follows:

> I further direct that the number of my said trustees shall be kept at five; and that vacancies shall be filled by the choice of a majority of the Justices of the Supreme Court, the selection to be made from persons of the Protestant religion.

On July 22, 1971, a civil complaint was filed in the First Circuit Court, challenging the appointment of Mr. Takabuki on the several legal grounds discussed, *infra*. Simultaneously with the filing of the civil complaint, plaintiffs moved to intervene in the equity proceedings relating to the Bishop Estate trust to enjoin the vesting of title to the trust property in Mr. Takabuki, jointly with the other trustees. Because the questions presented in the equity motion were similar to, or inextricably interrelated with, those in the civil action, the cases were consolidated.

In connection with the complaint, the plaintiffs sought a preliminary injunction to stay the confirmation or vesting of Mr. Takabuki as trustee. The court denied the motions for a preliminary injunction and for intervention, and granted motions, filed by the named defendants, to dismiss the civil complaint. The complaint has named as defendants the Supreme Court of Hawaii, each of the five Justices of the court as individuals, and the Attorney General. Since the plaintiffs had not joined Mr. Takabuki as defendant, the court dismissed the complaint on the ground that plaintiffs had failed to join an indispensable party. H.R.C.P., Rules 19 and 12(b)(7).

The court also dismissed the complaint on the further ground that it failed to set forth a claim for relief, H.R.C.P., Rule 12(c).

On August 4, 1971, the date when the court issued the vesting order in the equity proceeding, an amended complaint was filed adding three additional plaintiffs, deleting the Supreme Court as defendant, and designating Mr. Takabuki as an additional defendant. On the same day, plaintiffs filed objections to orders, together with a motion to strike orders, which had been filed by defendants pursuant to the previous oral rulings of the trial court dismissing the civil complaint and denying the motion to intervene in the equity proceeding. Defendants opposed the motion and objections, and moved to strike the amended complaint. The court ruled for defendants and a written order was entered on August 24, 1971. On August 27, 1971, plaintiffs filed a notice of appeal from all of the above adverse rulings by the trial court.

Pursuant to a motion for Disqualification of Justices of the Supreme Court and Selection of Alternate Justices, the five defendant-appellee Justices of the Supreme Court filed certificates of recusal on October 1, 1971. *Kekoa v. Supreme Court of Hawaii*, 53 Haw. 174, 488 P.2d 1406 (1971). On October 5, 1971, orders filed by the Chief Justice designated us to sit as substitute justices.

The amended complaint filed by plaintiffs does not present any issues of substantive law not also presented in the original complaint. Since the original complaint was dismissed not only because of failure to join Mr. Takabuki, but also under the provisions of Rule 12(c), if the decision of the trial court was correct in dismissing the original complaint, then it would not be reversible error for the trial court to have granted the motion to strike the amended complaint. We turn to the important substantive issues presented by the plaintiffs' complaints.

I.

Appellants first argued that the method of selection of Mr. Takabuki as trustee, although according to the provisions of the will of Bernice Pauahi Bishop, is in violation of the U.S. Const., 14th Amendment and of the Hawaii Const., Art. I, §4. More specifically, appellants argue that appointment of trustees for the Bishop Estate trust is "state action," and that, therefore, the appointment is subject to the procedural due process guarantees of notice to interested parties and meaningful preselection hearings. *See generally, Brunswick Corporation v. Galaxy Cocktail Lounge,* 54 Haw. 647, 513 P.2d 1390 (1973); *Freitas v. Gomes,* 52 Haw. 145, 152, 472 P.2d 494, 498 (1970); *Sniadach v. Family Finance Co.,* 395 U.S. 337 (1969); *Goldberg v. Kelly,* 397 U.S. 254 (1970). Since, as is conceded, neither notice nor formal opportunity to be heard were given, appellants argue that the appointment was constitutionally defective and hence void.

In evaluating the need for the procedural due process guarantees, the threshold issue is the character of the trustee selection process and of the functions of the Bishop Estate trust. Unless essentially governmental functions are involved in substance, whatever the form, the constitutional provisions that protect a citizen against arbitrary action of his government would not be applicable. For over fifty-five years the law on one of these issues has been clear. In *Estate of Bishop,* 23 Haw. 575, 581-82 (1917), *aff'd,* 250 F.145, 149-50 (9th Cir. 1918) the testamentary provisions here at issue were authoritatively interpreted as delegating the power of appointment to the Justices not as a court, but as individuals. *See, Estate of Carter,* 24 Haw. 536, 538-39 (1918).

Devising an adequate definition of "state action" is an extremely difficult task. *See, Aluli v. Trusdell,* 54 Haw. 417, 422-25, 508 P.2d 1217, 1220-22 (1973); *Evans v. Newton,* 382 U.S. 296, 299 (1966). Appellants have indicated "obvious" indicia of alleged governmental involvement in the trustee selection process and in the functions of the Bishop Estate trust, and have also alleged "non-obvious involvement of the State" therein in order to prove "state action." *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 722 (1961). *Cf. In re Estate of Bishop,* 53 Haw. 604, 608-16, 499 P.2d 670, 673-77 (concurring opinion of Abe, J.). Certainly the unique aspects of the Bishop Estate trust – its size, mission, status within the state, and role in the history of the Hawaiian Islands – have made the issue still more complex.

However, even under the very recent and innovative expansions of the rights to procedural due process in non-criminal matters, we are constrained to hold that even if the trustee selection process or the functions of the Bishop Estate trust may be "state action," appellants have been deprived of no constitutional rights. The crucial issue is the interpretation of the well-known constitutional language that no state shall deprive any person

> . . . of life, liberty, or property, without due process of law . . . .

U.S. Const., 14th Amendment; Haw. Const., Art. I, §4. It is obvious that appellants have lost neither "life" nor "liberty," and we think that it is equally clear that there has been no deprivation of "property."

For purposes of due process procedural fairness, protection is obviously appropriate for such "property" as wages, *Sniadach v. Family Finance Corp.,* 395 U.S.

337 (1969), and chattels possessed on conditional sales contract, *Fuentes v. Shevin*, 407 U.S. 67 (1972). But palpability has not been the touchstone in the test for applicability of due process standards under the "property" concept, for the procedural guarantees have also been held to be constitutionally required prior to suspension of "important interest[s]" such as a driver's licesnse, *Bell v. Burson*, 402 U.S. 535, 539 (1971). There is also potent authority for applicability of the guarantees whenever there is deprivation under a "legitimate claim of entitlement" to benefits under state law or regulation, *Perry v. Sinderman*, 408 U.S. 593, 602 (1972); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970). The "legitimate claim of entitlement" test seems to have been stretched so far as to include deprivation of benefits from government if claimed under a "clearly implied promise." *Board of Regents v. Roth, supra* at 577, citing, *Connell v. Higginbotham*, 403 U.S. 207, 208 (1971).

The "property" right that appellants claim to have lost, or may lose, through the appointment of Mr. Takabuki[1] as trustee is nowhere particularized.

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[1] The book *Men and Women of Hawaii 1972*, being "A biographical director of noteworthy men and women of Hawaii", edited by Betty Finley Buker and published by Star-Bulletin Printing Company, Inc., after describing Matsuo Takabuki as an attorney at law and estate trustee, gives the following information:

> He was born at Haleiwa, Oahu on February 25, 1923, being the son of Matsuzo and Misao (Kurihara). He married Ayako Saiki on January 23, 1946, and has three children. He graduated Waialua Intermediate and High Schools in 1940, and attended the University of Hawaii 1940-43. He received the Doctor of Jurisprudence Degree from the University of Chicago in 1949; from 1949-1952 he was an attorney with

At best, appellants' contention that beneficiaries of a charitable trust have a "property" right in the trustee selection process is a novel argument. The black letter law is, without ambiguity, quite to the contrary. When the settlor designates a method for filling vacancies in the office of trustee, the method designated is the only method to be utilized. Restatement (Second) of Trusts, §§338, 108 and Comments (*f*) and (*i*); A. Scott, Trusts, §388. Under traditional trust law appellants have no "property" or other right to participate in the choice of a new trustee, contrary to the wishes of the settlor.

Nor does appellants' interest in the appointment process or in the identity of the appointee-trustee amount to a "property" right under any of the constitutional tests set forth, *supra*. There is, and can be, no "clearly implied promise" to appoint a person meeting the subjective hopes of any particular beneficiary or member of the public. Appellants have no "legitimate claim of entitlement" to the choice of any individual, or kind of individual, as trustee. It has been held that far more than an "abstract need or desire for" or "unilateral expectation of" a benefit must be shown. *Board of*

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the Territory of Hawaii Department of Labor, and has been in the private practice of law since 1952. From 1953-1971 he served as a member of the Board of Supervisors and City Council of the City and County of Honolulu. He served with the U.S. Army as a member of the 442nd Combat Team from 1943-1945. He was a Trustee of the Palama Settlement from 1961-1965. Other mentioned association activities are membership in the American and Hawaii Bar Associations, the American Cancer Society (Hawaii Drive Chairman, 1954), Aloha United Fund (executive campaign committee 1965), Democratic Party (Chairman 1956 State Convention), 442nd Veterans Club (1952 President). His residence and office addresses are in Honolulu, Hawaii.

Regents v. Roth, supra at 577. A "mere subjective 'expectancy' " is not protected by due process. *Perry v. Sinderman, supra* at 603.

Any "important interests" that appellants, or any of them, may have as beneficiaries under the will certainly should not vary as contingent on the identity of the trustee. We will not anticipate post-appointment grievances. Trustee action may be challenged in the usual and proper manner in the circuit courts under the strict fiduciary and other standards applicable to all trustees. All we decide here is that there is no due process infirmity in the selection process itself.

II.

Appellants next argue that the exercise of the power of appointment under the will of Bernice P. Bishop is in violation of the 1968 Hawaii Constitution. We cannot agree.

Hawaii Constitution, Art. V, §3, on which appellants rely, provides in pertinent part:

> No justice or judge shall hold any other office or position of profit under the State or the United States.

Only if holding the power of appointment under the will could be construed as an "office or position of profit under the State or United States" does this cited provision become applicable. We think that it would strain credibility to hold that exercise of a testamentary power of appointment is covered by the meaning of this constitutional provision.

However one may define "office or position of profit," the concept obviously could not include powers of appointment where no remuneration or compensation is to accrue to the holder of the power. The constitutional

provision upon which appellants rely tracks the language of the provision in the 1950 Constitution and was adopted without argument or proposed amendment. See 2 *Proceedings of the Constitutional Convention of Hawaii of 1968* (1972), September 4, 1968, pp. 369-70. In 1950, the provision was adopted as written, and was explained during debate as permitting a judge or justice to accept a position on a board or commission so long as it be "without pay." 2 *Proceedings of the Constitutional Convention of Hawaii (of 1950)* (1960), June 8, 1950, p. 371; 1 *Proceedings of the Constitutional Convention of Hawaii (of 1950)* (1960), "Standing Committee Report No. 37," p. 174.

In other jurisdictions, interpretations of similar phraseology have been in accord: *Opinion of the Justices*, 283 Ala. 341, 217 So. 2d 53 (1968); *Baker v. Board of Commissioners of Crook County*, 9 Wyo. 51, 59 Pac. 797 (1900). Since no compensation whatsoever is provided for the exercise of the power of appointment of Bishop Estate trustees, we hold that such exercise is not within the constitutional prohibition against the simultaneous holding of an "office or position of profit" and the holding of the office of Hawaii Supreme Court Justice.

Appellants' argument that the disjunctive "or" between "office" and "position" should be read in the context of the constitutional provision as prohibiting the holding not of an "office . . . *of profit* under the State or United States" but of *any* "office . . . under the State or United States" is not well-taken, for two reasons. The debates and committee report, *supra* both show that the delegates to the Constitutional convention understood the provision here at issue to prohibit the holding of "offices . . . *of profit*" and not to prohibit the holding of *all* "offices . . . under the State and United States." Secondly, even if we accept appellants' arguments that

the Bishop Estate trust is "affected with a broad public interest," it would not therefore follow, as has been argued, that the holder of the power to appoint its trustee is thereby made an officer of the State. Appellants overlook the fact that every charitable trust is affected with some broad public interest; yet, this factor has never been reason to rule the holders of a power to appoint trustees of such a charitable trust become, thereby, public officials.

Appellants suggest an additional reason for, and meaning of, Article V, §3, Hawaii Constitution, assuming *arguendo* that it could apply to the nonremunerative exercise of the power of appointment in this case. It is argued that Article V, §3 represents a policy decision, of constitutional magnitude, that the people of Hawaii seek to preserve the energy and working hours of judicial officers for judicial tasks. Such an argument was one of those relied upon by the New York Court in interpreting a similar New York constitutional provision. *In re Richardson*, 247 N.Y. 401, 420-21, 160 N.E. 655, 661 (1928). While we may personally and generally agree with this laudable objective, we find no authority that will substantiate our attributing to Article V, §3, a meaning that would effectively bar members of the Judiciary from undertaking tasks that may be in the public interest, though not within the precise purview of a designated judicial office. We note that the duties held to be unconstitutionally delegated in *In re Richardson, supra*, were extremely onerous and not at all comparable to the rare exercise of the power of appointment involved in this case. Moreover, one delegate to the Constitutional Convention of 1950 absolutely objected to the constitutional provision's being enacted if it's terms would permit any remunerative or nonremunerative service of any kind on boards or commissions; he argued that such service

would necessarily demand an undesirable division of the "time and effort" of the serving member of the Judiciary. Since the provision was approved as written, the objecting delegate was clearly stating a minority position which never became law. *Proceedings of the Constitutional Convention of Hawaii (of 1950)* (1960), June 8, 1950, p. 371.

We note parenthetically that the public interest has occasionally required the time and talents of such high judicial officials as Justices of the Supreme Court of the United States, acting outside of, and independent of, the functions of their offices. For some instances of non-judicial activity on the part of U.S. Supreme Court Justices and lower court judges, together with a discussion of the problems and benefits involved, see Mason, *Extra-Judicial Work for Judges: The Views of Chief Justice Stone*, 67 Harv. L. Rev. 193 (1953); H.M. Hart and H. Wechsler, *Note on Extra-Curricular Activities of Federal Judges*, The Federal Courts and the Federal System, pp. 102-05 (1953). *Cf.* 20 U.S.C. §§42, 72. These authorities indicate that members of the American judiciary have repeatedly served in important nonjudicial posts because of the public need. Exercise of the power of appointment of trustees to the Bishop Estate trust is well within sound traditional perimeters.

III

Finally, appellants argue that the appointment of Mr. Takabuki violates the Canons of Judicial Ethics, to which the five defendant Justices of the Supreme Court of Hawaii are made subject by Rule 19 of the Rules of the Supreme Court of the State of Hawaii. We note at the outset that even if we were to hold that certain Canons had been violated, such a holding would not necessarily

be grounds for invalidating the appointment, whatever other consequences might thereby follow, in that appellants have shown no violation of any constitutional right despite their strenuous contentions evaluated in Part I and II.

Nevertheless, assuming *arguendo* that the Canons are relevant to this action, we have carefully evaluated appellants' arguments; however, we decline to adopt any of them. To some extent these arguments overlap those presented by appellants in arguing their position on the relevancy of Art. V, §3, Haw. Const., especially as to use and conservation of the time and talents of members of the Judiciary. See Canons 23, 26 and 33. We have discussed these contentions *supra*, Part II, and here need only reiterate that the public interest often justifies members of the Judiciary in performing nonjudicial tasks, so long as the nature of such tasks is not overwhelmingly burdensome. *In re Opinion of the Justices*, 307 Mass. 613, 621-22, 29 N.E.2d 738, 743-44 (1940).

But appellants also rely on Canons 23, 26, and 33, together with Canons 1 and 4, in order to press an argument that the appointment process was defective because of an "appearance of impropriety," in that (1) because judges are ethically precluded from reviewing their own acts, there would be an appearance of impropriety if the defendant Justices were to review the validity of the appointment process; and (2) because it is "unseemly" for a justice to pass on the acts of trustees he has appointed, there would be a second instance of an appearance of impropriety.

(1) The first contention as to appearance of impropriety has been mooted by the certificates of recusal filed by the defendant Justices. Moreover, under Article V, §2, Haw. Const., circuit court judges can be appointed to replace recused or disqualified justices, as has been done

in this case. We take judicial notice of the fact that the provisions of Article V, §2 are frequently implemented, precisely in order to avoid any appearance of impropriety.

The fact that the defendant Justices felt the need to file certificates of recusal no more renders unethical their exercise of the Bishop Estate trust appointment power than would the filing of a certificate of recusal or disqualification render unethical either a justice's prior private participation in a business enterprise later present on appeal before the court, or a family or other relationship with an attorney present to argue before the court. Certificates of recusal and disqualification and Article V, §2, are the methods available for avoiding any appearances of impropriety. So long as these methods are available and utilized, to hold that the exercise of the power of appointment of trustee for the Bishop Trust is *per se* unethical because of an appearance of impropriety would truly be using the anvil to kill the fly.

(2) There is no appearance of impropriety in the appointment mechanism, despite appellants' argument that it is "unseemly" for a justice to pass on the acts of his own appointees. *Cf. Hobson v. Hansen*, 265 F.Supp. 902, 919 at 930-32 (D.D.C. 1967)(dissenting opinion of Wright, J.) *Appeal dismissed*, 393 U.S. 801 (1968).

Appellants' argument is well-taken, but only up to a point, because necessity often compels judges and justices to hear cases in which they have an interest. In some instances, even direct, individual, personal, and financial interest have not disqualified judges from hearing a case because of the exigencies of the situation. *Evans v. Gore*, 253 U.S. 245, 247 (1920); *Gordy v. Dennis*, 176 Md. 106, 109, 5 A.2d 69, 70 (1939); *Long v. Watts*, 183 N.C. 99, 102, 110 S.E. 765, 767 (1922); *Poorman v. State Board of Equalization*, 99 Mont. 543, 545, 45 P.2d 307,

308 (1935); *Girard v. Defenbach*, 61 Idaho 702, 706, 106 P.2d 1010, 1011 (1940); *Loughran v. F.T.C.*, 143 F.2d 431, 433 (8th Cir. 144); *New Jersey St. Bar Ass'n v. New Jersey Ass'n of Realtor Boards*, 118 N.J. Super 203, 287, A.2d 14, 18 (1972). Moreover, here, the personal interest of the defendant Justices is considerably more attenuated than in the above cases, in that it is only the same interest as that of any other resident of the State of Hawaii in any charitable trust with a general public purpose.

Although case authority on the instant issue is sparse, where disqualification of a judge has been urged solely on the grounds that he should not sit in review on the acts of his own appointees, most authority hold that a judge is not disqualified from reviewing the acts of his appointees unless some indication of the judge's "direct, certain, or immediate" interest is shown, beyond whatever speculative interest, if any, inheres in having originally made the appointment of the litigant whose action is being challenged. *Siemer v. Schuermann Building & Realty Co.*, 381 S.W.2d 821, 829 (Mo. 1964); *Miller v. City and County of Denver*, 63 Colo. 389, 167 Pac. 769 (1917)(dictum); *Hobson v. Hansen*, 265 F.Supp. 902, 918-19 (D.D.C. 1967)(semble), *appeal dismissed*, 393 U.S. 801 (1968); *cf.* Annot., 10 A.L.R.2d 1307, 1339 (1950). In fact, there is state statutory authority for the proposition that judges can review the acts of trustees appointed by them. Compare, H.R.S. §§ 554-1 and 554-4.

Finally, we note some of the past instances of legal disputes, both among the trustees *inter sese* and with third parties, in which the actions or legal contentions of some or all of the Bishop Estate trustees have been reviewed by the Supreme Court of Hawaii and have been held invalid or improper, in whole or in part. *Midkiff v. Kobayashi*, 54 Haw. 299, 507 P.2d 724 (1973); *Kaiser*

Hawaii-Kai Development Co. v. Murray, 49 Haw. 214, 412 P.2d 925 (1966); *Richards v. Midkiff*, 48 Haw. 32, 396 P.2d 49 (1964); *Bishop Estate Trust v. Castle & Cooke*, 45 Haw. 409, 368 P.2d 887 (1962); *Estate Bernice P. Bishop*, 37 Haw. 111 (1945); *Collins v. Hodgson*, 36 Haw. 334, 339 (1943). *See also: In re Trustees Under Will and of the Estate of Bernice P. Bishop, Dec.*, 16 Haw. 804 (1905). A roughly equivalent number of cases has been decided in favor of the trustees. While we do not think that this kind of judicial history is dispositive on the issue of "appearance of impropriety," where appellants have failed to indicate any instance of the alleged appearance of impropriety, we can only note that we can build no presumptions on the basis of the above history of judicial review of Bishop Estate trustee action, and that certainly no appearance of impropriety is shown on the record and posture of the case now before us.

Appellants' references to Canons of Judicial Ethics, Canons 13, 16, 17, and 25 are irrelevant, because, as to Canons 13 and 25, there is no intimation of kinship, influence, or personal investment by the defendant Justices, and because, as to Canons 16 and 17, there is no judicial action involved herein.

Appellants' other contentions need not be discussed since our answers to the above substantive questions dispose of this case. We can find no error in the ruling of the trial court.

Affirmed.

Samuel P. King (Thomas Gill, Thomas Pico, Edward Kemper, Allan Haley and *Arthur K. Trask* of counsel) for plaintiffs-appellants.

Walter G. Chuck (Chuck & Fujiyama of counsel) for defendants-appellees, *William S. Richardson*, et al.

J. Garner Anthony (Anthony, Hoddick, Reinwald & O'Connor of counsel) for defendants-appellees, *Frank Midkiff*, et al.

Bertram T. Kanbara, Special Deputy Attorney General, for defendant-Appellee, *George T.H. Pai.*

LANHAM, CIRCUIT JUDGE, CONCURRING:

I agree with the statement of facts and the summary of the prior court actions taken in this case, as set forth in the majority opinion.[1] I also concur in the majority opinion, except that, in my opinion, it failed to dispose of one of the important issues on this case. That issue is slightly touched upon in the portion of the majority opinion which reads as follows:

> "... Trustee action may be challenged in the usual and proper manner in the circuit courts under the strict fiduciary and other standards applicable to all trustees. All we decide here is that there is no due process infirmity in the selection process itself."

One of the contentions urged by the appellants in their appellate brief was that inasmuch as the appointment of the successor trustee in this case bore not only the

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[1](a) It should be added that the purpose of the trust is to erect and maintain in Hawaii one school for boys and one for girls, and further that a portion of the income of the trust would be used for the support and education of orphans and other indigents, preference to be given to Hawaiians of pure or part aboriginal blood.

(b) An additional former plaintiff, an association known as The Hawaiians, withdrew from this appeal and appealed to the U.S. Supreme Court, which petition was dismissed by that court in a *per curiam* decision on December 14, 1971. *Pae Galdeira and the Hawaiians v. Richardson*, et al, 404 U.S. 993, reh. den. 405 U.S. 948.

signatures of all the justices, but also bore the official seal of the supreme court and was first filed in the supreme court, that the probate judge, in being presented with such a document, would believe that the supreme court itself, and not the members thereof as individuals, had made the appointment. This coupled with the decisions of *Estate of Bishop*, 23 Haw. 575, *aff'd*, *King v. Smith*, 250 Fed. 145, (9th Cir. 1918) could leave the probate judge with the impression that such an appointment by the supreme court justices in non-reviewable by the circuit court in probate.

While I do not agree with appellants that the affixing of the supreme court seal to the appointment means that the appointment is "state action", rather than a technical procedural error, nevertheless, the appellants' argument presents an issue which should be decided. I also believe that to decide this issue of what powers the circuit court in probate has over such an appointment once received is not only necessary to this case, but that such decision will prevent uncertainty and litigation on the same point in the future.

The validity of this will, insofar as the appointment powers of the justices of the supreme court are concerned, has already been interpreted in *Estate of Bishop*, 23 Haw. 575, 581-2 (1917), *aff'd* 250 Fed. 145, 149-50 (9th Cir. 1918), wherein it was held that such powers of appointment of trustees to fill vacancies were conferred upon the justices, as individuals, and not as a court. Where such an interpretation is made the power is not null and void or violative of law. 90 C.J.S. *Trusts* §213a, *In re John's Will*, 30 Ore. 494 (1896) 47 Pac. 341. Had the courts in the cases of *Estate of Bishop, supra*, interpreted the will as conferring such appointive powers on the justices in their official capacities such a provision would be null and void inasmuch as court jurisdiction

cannot be conferred or changed by the provisions of a will. 90 C.J.S. *Trusts* §213a, Bogert, Trusts and Trustees, §532, at 410 (2d ed.); *Leman v. Sherman*, 6 N.E. 872, 117 Ill. 657 (1886); *Harwood v. Tracy*, 24 S.W. 214; 118 Mo. 631 (1893); *Petition of Straw*, 102 Atl. 628; 78 N.H. 506 (1917); *Estate of Carter*, 24 Haw. 536, (1918). Insofar as these decisions, although they were made fifty-three years ago, conclude that the supreme court justices, as individuals (and not as a court) have the power to select, nominate and appoint the successor trustees of Mrs. Bishop's estate, as was her expressed intention,[2] I concur. Of course, the individual justices may decide as individuals not to exercise such powers, or the supreme court by rule, or the legislature by statute, may terminate such procedure, but as the law now stands I see no impediment to such an appointing process by the justices as individuals. The problem arises, however, from the following portions of the decisions in *Estate of Bishop, supra,* and *King v. Smith,* et al., *supra,* which seem to say that the supreme court justices' apppointment, even though made as individuals, may not be subject to review by the circuit court judge in probate.

Thus in *King v. Smith,* 250 Fed. at 149, we find the following:

> "Further, the power of appointment, when exercised, is final. The vacancy or vacancies, whatever they may be, are filled by the act. The process of appointment ends there, and no court has

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[2] Courts, judges and justices are most reluctant to set aside, or hold non-effective, the provisions of a person's last will and testament, especially where made with the kind, loving and generous motives with which this one was obviously made. (See 5 Page on Wills, §41.7, at 185-7).

authority, except for just cause for removal, to disturb the appointment; that is to say, no court has authority or power to review or supervise the appointment made by the justices."

And in *Estate of Bishop,* 23 Haw. 575 at 583, the court stated:

"... The will does not provide that the choice or appointment made by the justices of this court should be subject to the approval or consent of any other officer or tribunal. The power of approval implies the power or right of disapproval–the power of vetoing the act of the justices of this court in exercising the power of appointment–and such veto power, if exercised as attempted by the learned circuit judge, would necessarily result in defeating the intent of the testatrix as expressed in the provision of her will under consideration. The only proper petition to the circuit judge would be one asking that he name the amount of the bond to be given by the appointee and approve the same when given."

If, and insofar as, these decisions infringe upon any statutory law[3] or, if, and insofar as, these decisions purport to give an appointment made by a majority of the individual supreme court justices any greater status than other valid appointments made by other responsible

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[3]See §§637-2, H.R.S., subsection (2), giving circuit judges the power to hear and determine suits for the enforcement or regulation of trusts; §554-1, H.R.S., giving the circuit judges, in cases of the valid appointment or succession of any trustee to fill a vacancy in any trusteeship, power to make a vesting order vesting legal title to the trust property "in the trustee so appointed".

individuals who are specifically empowered to make such appointments by the terms of the trust instrument, they should, in my opinion, no longer be followed. It is not clear whether it was even the intent of these decisions to so hold, but, in view of the quoted language from these decisions I think we should modify such decisions to make it clear that, in case of such an appointment of a trustee by a majority of the supreme court justices as individuals, or by any other person empowered by the terms of a trust instrument to appoint successor trustees, while the cirduit [sic] judge must ordinarily accept an appointment if the appointee is qualified, willing and able to serve as trustee, II *Scott on Trusts*, 3d ed. §108.2 at 858; IV *Scott on Trusts*, 3d ed. § 388 at 2996-7; *Glader v. Schwinge*, 336 Ill. 551, 168 N.W. 658; 66 A.L.R. 172 (1929); *Hartman v. Orr*, 35 Ohio Abs. 528 41 N.E.2d 406 (1941); *Raffety v. Parker*, 241 F.2d 594 (8th Cir 1957); *In re Sotnikoff*, 34 N.J. Super. 422, 112 A.2d 754 (1955); 54 Am.Jur., *Trusts*, §133 at 113; *Estate of Farrington*, 42 Haw. 640, nevertheless, such circuit judge is in my opinion, empowered by law to review every such appointment for determination of at least the following:

1. To determine whether the appointment was made in accordance with the terms of the trust document; II *Scott on Trusts*, 2d ed. §108.3; §637-2(2), H.R.S.;

2. In cases where the qualifications of the trustee are set forth in the trust instrument, to determine if the appointee meets those qualifications; II *Scott on Trusts*, 3d ed. §108.3; §637-2(2), H.R.S.;

3. To determine the issue, where raised, of the mental competency or any incapacity of an appointee; II *Scott on Trusts*, 3d ed. §108.3; *Bowditch v. Banuelos*, 1 Gray 220 (Mass. 1854).

4. To determine the amount of bond, if any is required, to be given by the appointee: §607-21, H.R.S.

5. To make certain orders regarding the appointee's service as trustee so as to cause conflict of interests, if any, to be resolved as a condition to continued service as trustee; *Bogert Trusts and Trustees*, §532; and

6. To determine any allegation that any such appointment violates a provision of the Constitution or the terms of a statute.

To the extent, if any, that *Estate of Bishop, supra* holds to the contrary, it should no longer be the law, and I would so hold. From a reading of the pleadings, including the proposed amended complaint, I do not regard any of the above six items as having been raised as an issue in this case, except for item number six which was decided in this case, so I find no reversible error in the Circuit court's following of that decision in this case.

Appendix C

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT STATE OF HAWAII

KEVIN JAMES KEKOA, a minor, by CATHERINE KEKOA ENOMOTO, his next friend; JAMES KAHIKINA AKAKA, a minor, by JOSEPH KAHIKINA AKAKA, his next friend; KAYLIA KAHELE, NOENOE LOREN KAHELE and WILLIAM KAHELE, all minors, by LOUISE G. KAHELE their legal guardian and next friend; MARMIONETT MAGOON KAOWILI; JOHN H. ALLEN, JR.; KALIKO BURGESS CHUN; ANNA GLADYS TRASK; AD HOC COMMITTEE FOR A HAWAIIAN TRUSTEE; THE FRIENDS OF KAMEHAMEHA SCHOOLS AND THE BERNICE PAUAHI BISHOP ESTATE; and THE HAWAIIANS, Plaintiffs, v. WILLIAM S. RICHARDSON; MASAJI MARUMOTO; KAZUHISA ABE; BERNARD H. LEVINSON; BERT T. KOBAYASHI; FRANK ELBERT MIDKIFF; ATHERTON RICHARDS; RICHARD LYMAN, JR.; HUNG WO CHING; MATSUO TAKABUKI; and GEORGE T. H. PAI, Defendants.	CIVIL NO. 34604 AMENDED COMPLAINT; EXHIBITS 1 to 13; SUMMONS

AMENDED COMPLAINT

1.01 Plaintiff KEVIN JAMES KEKOA is a student at The Kamehameha Schools, a minor, of part-Hawaiian

blood, and a resident of Hawaii, and brings this action by his next friend, CATHERINE KEKOA ENOMOTO, his sister and a resident of Honolulu, Hawaii.

1.02 Plaintiff JAMES KAHIKINA AKAKA is eligible to be a student at The Kamehameha Schools, a minor, of part-Hawaiian blood, and a resident of Hawaii, and brings this action by his next friend, JOSEPH KAHIKINA AKAKA, his father and a resident of Honolulu, Hawaii.

1.03 Plaintiff KAYLIA KAHELE is a student at The Kamehameha Schools, a minor and an orphan, of part-Hawaiian blood, a resident of Hawaii, and brings this action by her court-appointed guardian and next friend, LOUISE G. KAHELE, her grandmother and a resident of Honolulu, Hawaii. Plaintiff KAYLIA KAHELE receives her tuition at The Kamehameha Schools and other financial support from the Trustees of the Estate of Bernice Pauahi Bishop, deceased, pursuant to the terms of the Will of said Bernice Pauahi Bishop, deceased.

1.04 Plaintiffs NOENOE LOREN KAHELE and WILLIAM KAHELE are minors and orphans, of part-Hawaiian blood, are eligible to receive tuition at The Kamehameha Schools, and other support, from the Trustees under the Will of Bernice Pauahi Bishop, deceased, are residents of Hawaii, and bring this action by their court-appointed guardian and next friend, LOUISE G. KAHELE, their grandmother and a resident of Honolulu, Hawaii.

1.05 Plaintiff MARMIONETT MAGOON KAOWILI is a parent of a student at The Kamehamaha Schools, and a resident of Honolulu, Hawaii.

1.06 Plaintiff JOHN H. ALLEN, JR., is a graduate of The Kamehameha Schools, and a resident of Honolulu, Hawaii.

1.07 Plaintiffs KALIKO BURGESS CHUN and ANNA GLADYS TRASK are educators by profession; each has

taught school in Hawaii, has special concern in the proper implementation of the provisions of the Will of Bernice Pauahi Bishop relating to education, and is a resident of Honolulu, Hawaii. Plaintiff KALIKO BURGESS CHUN is a graduate of The Kamehameha Schools.

1.08 Plaintiff AD HOC COMMITTEE FOR A HAWAIIAN TRUSTEE is a coalition of some twenty-two organizations to consider and take appropriate action with respect to the attempted appointment of Matsuo Takabuki as a trustee under the Will and of the Estate of Bernice Pauahi Bishop, deceased. Each of the organizations in the coalition is composed of persons most of whom are residents of Hawaii and are eligible, or whose children are eligible, for benefits under the Will and of the Estate of Bernice Pauahi Bishop, deceased. Each of the organizations in the coalition, and the coalition itself, has as one of its objectives insuring that the purposes as well as the letter of the Will of Bernice Pauahi Bishop are carried out. CURTIS KEKOA, a resident of Honolulu, Hawaii, is chairman of Plaintiff AD HOC COMMITTEE FOR A HAWAIIAN TRUSTEE.

1.09 Plaintiff THE FRIENDS OF KAMEHAMEHA SCHOOLS AND THE BERNICE PAUAHI BISHOP ESTATE is an unincorporated association of persons most of whom are residents of Hawaii and are eligible, or whose children are eligible, for benefits under the Will and of the Estate of Bernice Pauahi Bishop, deceased. The association has as its primary purpose to preserve intact the Will of Bernice Pauahi Bishop and as its secondary purpose to work for the general welfare and the betterment of the Hawaiian people. DOUGLAS AH LEONG, a resident of Honolulu, Hawaii, is president of Plaintiff THE FRIENDS OF KEMEHAMEHA SCHOOLS AND THE BERNICE PAUAHI BISHOP ESTATE.

1.10 Plaintiff THE HAWAIIANS is an unincorporated association of persons most of whom are residents of

Hawaii and are eligible, or whose children are eligible, for benefits under the Will and of the Estate of Bernice Pauahi Bishop, deceased. Members of the association reside in each county in the state. The association is formed for the purposes, among others, of seeking justice and promoting the general welfare of the Hawaiian people in social, spiritual, educational and economic affairs and of providing a formal voice and organization through which the Hawaiian people may participate fully and more meaningfully in the determination of policies and decisions affecting the destiny of the Hawaiian people, including the appointment of successor trustees under the Will and of the Estate of Bernice Pauahi Bishop, deceased. PAE GALDEIRA, a resident of Honolulu, Hawaii, is president of Plaintiff THE HAWAIIANS.

2.01 Defendants WILLIAM S. RICHARDSON, MASAJI MARUMOTO, KAZUHISA ABE, BERNARD H. LEVINSON, and BERT T. KOBAYASHI, are the chief justices and associate justices, respectively, of the Supreme Court of the State of Hawaii, and are sued as individuals and also as members of the Supreme Court of the State of Hawaii.

2.02 Defendants FRANK ELBERT MIDKIFF, ATHERTON RICHARDS, RICHARD LYMAN, JR., and HUNG WO CHING, are residents of Hawaii, are trustees under the Will and of the Estate of Bernice Pauahi Bishop, deceased, and are sued as such trustees.

2.03 Defendant MATSUO TAKABUKI is a resident of Hawaii, and purports to be a duly appointed Trustee under the Will and of the Estate of Bernice Pauahi Bishop, deceased, and is sued both as an individual and in his purported capacity as such trustee.

2.04 Defendant GEORGE T.H. PAI is the acting attorney general of the State of Hawaii, is an indispensable party to this action, and is joined as a defendant herein pursuant to Rule 10(a) of the Hawaii Rules of

Civil Procedure.

3.01 Herbert K. Keppeler died in Honolulu, Hawaii, March 18, 1971. At the time of his death, he was a trustee under the Will and of the Estate of Bernice Pauahi Bishop, deceased.

3.02 Bernice Pauahi Bishop died October 16, 1884, and her Will with the two codicils thereto was admitted to probate by the Supreme Court of the Hawaiian Islands on December 2, 1884, all as appears from the records and files of the Supreme Court of the Hawaiian Islands in Probate No. 2425 of this court in Equity No. 2048 to which records and files reference is hereby made and of which Plaintiffs request this Honorable Court to take judicial notice.

3.03 The Fourteenth article of the Will of Bernice Pauahi Bishop provides in part:

> "I further direct that the number of my said trustees shall be kept at five; and that vacancies shall be filled by the choice of a majority of the Justices of the Supreme Court, the selection to be made from persons of the Protestant religion."

3.04 A trusteeship of the charitable trust established by the Will of Bernice Pauahi Bishop is affected with a broad public interest. The trust estate now includes about 370,000 acres of land or approximately one-eleventh of the total land area of the State of Hawaii, and has a value in excess of $400,000,000.

3.05 Bernice Pauahi Bishop was a great-granddaughter of Kamehameha the Great, and the lands she left in trust for the prupose of educating boys and girls of Hawaii were the Kamehameha Lands that had come to her by inheritance and devise. The Kamehameha Lands were lands which had been awarded in the Great Mahele by Kamehameha III (who owned all of the lands in the Hawaiian Kingdom) to the several then living chiefs of

the Kamehameha family. Some of these chiefs created trust estates–in several cases charitable trust estates–of their lands. Most of the remaining Kamehameha lands came down to Bernice Pauahi Bishop as the last of the Kamehameha family. At her death, her inventory of such lands totaled 431,378 acres. Her husband, Charles R. Bishop, before his death, added another 64,615 acres to his deceased wife's trust estate.

3.06 The purposes of the trust established by the Will of Bernice Pauahi Bishop, deceased, are set forth in the Thirteenth article of her Will, which reads in part as follows:

> "Thirteenth. I give, devise and bequeath all of the rest, residue and remainder of my estate real and personal, wherever situated unto the trustees below named, their heirs and assigns forever, to hold upon the following trusts, namely: to erect and maintain in the Hawaiian Islands two schools, each for boarding and day scholars, one for boys and one for girls, to be known as, and called the Kamehameha Schools. I direct my trustees to expend such amount as they may deem best, not to exceed however one-half of the fund which may come into their hands, in the purchase of suitable premises, the erection of school buildings, and in furnishing the same with the necessary and appropriate fixtures furniture and apparatus. I direct my trustees to invest the remainder of my estate in such manner as they may think best, and to expend the annual income in the maintenance of said schools; meaning thereby the salaries of teachers, the repairing buildings and other incidental expenses; and to devote a portion of each years income to the support and education of orphans, and others in indigent circumstances, giving the preference to

Hawaiians of pure or part aboriginal blood; the proportion in which said annual income is to be divided among the various objects above mentioned to be determined solely by my said trustees they to have full discretion. I desire my trustees to provide first and chiefly a good education in the common English branches, and also instruction in morals and in such useful knowledge as may tend to make good and industrious men and women; and I desire instruction in the higher branches to be subsidiary to the foregoing objects. For the purposes aforesaid I grant unto my said trustees full power to lease or sell any portion of my real estate, and to reinvest the proceeds and the balance of my estate in real estate, or in such other manner as to my said trustees may seem best. I also give unto my said trustees full power to make all such rules and regulations as they may deem necessary for the government of said schools and to regulate the admission of pupils, and the same to alter, amend and publish upon a vote of a majority of said trustees. . . ."

3.07 Pursuant to these provisions the trustees established on Oahu two schools, known as The Kamehameha Schools; the boys' school opened in 1887 and the girls' school in 1894. For the academic year 1970-1971, the trust estate provided over $1,500,000.00 in tuition, books, fees, transportation, clothing, food and other assistance to 125 orphans and 363 indigent children (including Plaintiff KAYLIA KAHELE) being educated at the Schools. In that same academic year, there were enrolled at both Schools 2.101 students (including Plaintiff KEVIN JAMES KEKOA) whose tuition and fees came from parents, friends and other outside sources. Even then, the trust estate provided indirect support and

assistance for such students, their families and friends; in 1970-1971, parents accounted for only 15.6% of the cost of educating each child at the Schools, while the remaining 84.4% was provided by the trust estate. The Kamehameha Schools in particular and the Estate of Bernice Pauahi Bishop, deceased, in general, have been considered as mainstays of Hawaiian culture and important sources of educational support for, among others, persons of pure or part Hawaiian blood.

3.08 Matters involving the Bishop Estate and its trustees come frequently before the Supreme Court of Hawaii, and there have been at least four cuch cases in the ten years since Hawaii was admitted as a State. In all of these matters, no justice of said Court, including Defendants RICHARDSON, MARUMOTO, ABE, LEVINSON and KOBAYASHI, has ever disqualified himself on the ground that he participated in and approved or disapproved of the appointment of any Trustee whose actions or omissions were before the Court for judicial review.

4.01 Defendants WILLIAM S. RICHARDSON, MASAJI MARUMOTO, KAZUSHISA ABE, BERNARD H. LEVINSON, and BERT T. KOBAYASHI, on June 18, 1971, purporting to act pursuant to the provisions of the Will of Bernice Pauahi Bishop, signed and filed with the Clerk of the Supreme Court of Hawaii a document entitled "Appointment of Matsuo Takabuki" whereby they purported to "appoint Matsuo Takabuki, of the City and County of Honolulu, State of Hawaii, a trustee under the will and of the estate of Bernice Pauahi Bishop, deceased, for a term to commence August 1, 1971 and to expire when the said Matsuo Takabuki attains the age of 70 years, unless sooner terminated." The document is sealed with the seal of the Supreme Court of Hawaii. A

true and correct copy of this document is attached hereto, marked Exhibit "1", and incorporated herein.

4.02 Prior to the filing of Exhibit "1" on June 18, 1971, as aforesaid, Defendants WILLIAM S. RICHARDSON, MASAJI MARUMOTO, KAZUHISA ABE, BERNARD H. LEVINSON, and BERT T. KOBAYASHI, either individually, collectively or as the Supreme Court of Hawaii, failed or refused to make any public statement or to release any public information concerning the procedure that was being followed in selecting a successor trustee to said Herbert K. Keppeler. Said Defendants failed or refused to promulgate standards for judging the qualifications of persons being considered for appointment as such trustee, and failed or refused to permit any open and meaningful participation by the public or by any interested person in the definition or application of such standards. No hearings on the selection of such successor trustee were held by any of said Defendants, and said Defendants failed or refused to promulgate or announce publicly any procedures to be followed by persons wishing to be considered for appointment as such successor trustee, by persons or groups wishing to nominate others for such appointment, or by persons or groups wishing to provide information or to enter objections with respect to persons being considered for such appointment.

4.03 Plaintiff THE HAWAIIANS, on behalf of interested persons, requested an opportunity to participate meaningfully in this selection process and in the defining of selection standards and was refused. True and correct copies of the letter on this subject dated April 6, 1971, and of the letter in response dated April 27, 1971, are attached hereto, marked Exhibit "2" and Exhibit "3", respectively, and incorporated herein.

5.01 Subsequent to June 18, 1971, Defendant MATSUO TAKABUKI made a public statement regarding his

purported appointment as a trustee under the Will and of the Estate of Bernice Pauahi Bishop, deceased, in which he affirmed that he "did not file application for the trusteeship at all." The story also quotes him as gaving said that he will have to "disengate" himself from his activities with Capital Investment Co. and other interests which might conflict with a position as such trustee. The statement appeared in a news story in the Honolulu Star-Bulletin on June 19, 1971, a true and correct copy of which story is attached hereto, marked Exhibit "4", and incorporated herein.

5.02 Subsequent to June 18, 1971, Defendant MASAJI MARUMOTO was interviewed by a newspaper reporter concerning the said purported appointment of Matsuo Takabuki and made certain statements pertaining thereto which appeared in a news story in the Honolulu Advertiser on June 26, 1971. A true and correct copy of this news story is attached hereto, marked Exhibit "5", and incorporated herein.

5.03 Subsequent to June 18, 1971, Defendant MASAJI MARUMOTO, with the consent and agreement of Defendants WILLIAM S. RICHARDSON, KAZUHISA ABE, BERNARD H. LEVINSON, and BERT T. KOBAYASHI, released a written statement concerning the said purported appointment of Matsuo Takabuki. This statement was published in full in the Honolulu Advertiser on June 30, 1971, and a true and correct copy of such statement as so published is attached hereto, marked Exhibit "6", and incorporated herein. The same statement was reported in a news story in the Honolulu Star-Bulletin on June 29, 1971, a true and correct copy of which story is attached hereto, marked Exhibit "7", and incorporated herein.

5.04 Subsequent to June 18, 1971, Defendant WILLIAM S. RICHARDSON made public statements

regarding the said purported appointment of Matsuo Takabuki. These statements were made in response to questions by news reporters and appeared in news stories in the Honolulu Star-Bulletin on July 6, 1971, and the Honolulu Advertiser on July 7, 1971. True and correct copies of these stories are attached hereto, marked Exhibit "8" and Exhibit "9", respectively, and incorporated herein.

5.05 Plaintiff AD HOC COMMITTEE FOR A HAWAIIAN TRUSTEE by its chairman, CURTIS KEKOA, wrote to then Attorney General Bertram T. Kanbara on July 14, 1971, requesting that the attorney general ask this court not to act on any petition seeking a vesting order until after a full, public investigation of all of Matsuo Takabuki's financial and personal relations that may have any bearing on Matsuo Takabuki's ability disinterestedly to serve the Estate of Bernice Pauahi Bishop, deceased, and until the court had an opportunity publicly to review the findings thereon. A true and correct copy of this letter is attached hereto, marked Exhibit "10", and incorporated herein.

5.06 Then Attorney General Bertram T. Kanbara replied to the letter described above (Exhibit "10") by letter dated July 15, 1971, a true and correct copy of which is attached hereto, marked Exhibit "11", and incorporated herein. In his letter, Mr. Kanbara states in part:

> "I agree that Mr. Takabuki should divest himself of any interest that may conflict with his duties as trustee. I expect that this office will review this matter and submit its report and recommendations to the court at the appropriate time. If you know of any facts indicative of such conflict or of any other matter which would prevent the proper discharge of his duties as trustee, may I suggest that you submit the same in writing to this office."

5.07 On July 22, 1971 Plaintiffs KEKOA, AKAKA, KAOWILI, ALLEN, CHUN, TRASK, THE FRIENDS OF KAMEHAMEHA SCHOOLS AND THE BERNICE PAUAHI BISHOP ESTATE, and THE HAWAIIANS (hereinafter referred to collectively as "prior plaintiffs") filed a Complaint in this Court, Civil No. 34604, against all of the defendants above named with the exception of Defendant TAKABUKI, together with a motion for a preliminary injunction or in the alternative for a stay of proceedings, and a motion to intervene in Equity No. 2048, all with the object of contesting the validity of the appointment of Defendant TAKABUKI and of staying further proceedings in Equity No. 2048 until such time as their claims could be adjudged on the merits.

5.08 Defendants FRANK ELBERT MIDKIFF, ATHERTON RICHARDS, RICHARD LYMAN, JR., and HUNG WO CHING, on July 26, 1971 petitioned this court for a vesting order in Equity No. 2048 aforementioned, requesting that title of all of the property forming the Estate of Bernice Pauahi Bishop, deceased, be vested jointly in them and said Defendant MATSUO TAKABUKI as co-trustees.

5.09 Prior Plaintiffs' various motions, and motions to dismiss filed by the various Defendants herein, came on for hearing before this Court on July 27, 1971. Defendant GEORGE T.H. PAI, in his official capacity as acting attorney general of the State of Hawaii, and purporting to act in his capacity as the common law representative of the beneficiaries of the Bernice Pauahi Bishop Estate, failed and refused to take the part of prior Plaintiffs in said hearing, and joined in opposing prior Plaintiffs' motions and asking that they be denied and the complaint be dismissed.

5.10 This Court, after hearing the arguments of counsel, thereupon denied prior Plaintiffs' motions and

ordered that their complaint be dismissed, and denied prior Plaintiffs' request for a stay pending appeal. Subsequently on the same day, Defendant BERNARD H. LEVINSON, in his capacity as associate justice of the Supreme Court of Hawaii, also denied prior Plaintiffs' request for a stay pending appeal.

5.11 The aforesaid petition of Defendants FRANK ELBERT MIDKIFF, ATHERTON RICHARDS, RICHARD LYMAN, JR., and HUNG WO CHING in Equity No. 2048 came on for hearing at 11:00 a.m. on July 29, 1971. Previous to such time, no written order had been entered on the record in said Civil No. 34604 dismissing the Complaint, and at said hearing counsel for prior Plaintiffs appeared and filed with the Court a motion to stay the vesting of title in Defendant TAKABUKI in order to allow Plaintiffs time to amend said Complaint pursuant to Rule 15(a) of the Hawaii Rules of Civil Procedure, which motion and the memorandum attached hereto are now part of the records and files of Equity No. 2048 and of which Plaintiffs request this Honorable Court to take judicial notice. Over the objections of counsel that proceeding to vest title in Defendant TAKABUKI would prejudice Plaintiffs' rights to amend their Complaint in Civil No. 34604, and their rights to oppose said Defendant's appointment, this Court ordered that the hearing proceed.

5.12 At said hearing this Court and Defendant GEORGE T.H. PAI, in his official capacity as acting attorney general of the State of Hawaii, failed to conduct any meaningful examination into the appointment and qualifications of Defendant TAKABUKI, and this Court refused to permit counsel for prior Plaintiffs to conduct such examination. This Court signed the order vesting title to the Bishop Estate jointly in Defendants MIDKIFF, RICHARDS, LYMAN, CHING and TAKABUKI immediately on conclusion of said hearing.

5.13 As recounted in the affidavits of CURTIS KEKOA and ARTHUR TRASK, attached hereto as Exhibits "12" and "13", respectively, and incorporated herein by reference, Defendant PAI subsequently gave as a reason for his joinder in requesting the dismissal of prior Plaintiffs' motions and complaint, for his failure to conduct any investigation or make any report concerning the qualifications of Defendant TAKABUKI, and for his *pro forma* approval of the vesting order, the 1917 decision of the Supreme Court of Hawaii, *In re Bishop Estate*, 23 Hawaii 575, aff'd. 250 F. 145 (9th Cir., 1918), which Defendant PAI maintains precludes him from reviewing any Bishop trustee appointment made by the justices of the Supreme Court of Hawaii.

6.01 Plaintiffs oppose and object to the manner in which Defendant MATSUO TAKABUKI was appointed as a trustee under the Will and of the Estate of Bernice Pauahi Bishop, deceased, and further oppose and object to the *pro forma* investiture of Defendant MATSUO TAKABUKI as described in paragraph 5.12 above, for the reasons and on the grounds herein set forth.

6.02 Neither Defendant MATSUO TAKABUKI, nor any of the other trustees under the Will and of the Estate of Bernice Pauahi Bishop, deceased, has any special knowledge, training, or experinece in the field of modern education, especially as affecting the education of orphans and others in indigent circumstances, and the failure to have at least one person with such background as a trustee is injurious to the purposes of the Estate of Bernice Pauahi Bishop and injurous to the interests of Plaintiffs.

6.03 It affirmatively appears from the statement of Defendant MASAJI MARUMOTO (Exhibit "6") that additional conditions were placed upon the said appointment of Defendant MATSUO TAKABUKI beyond those

set forth in the appointment document (Exhibit "1") but the exact nature and extent of these additional conditions have not been made public, and no procedure has been provided and no standards have been established by Defendants WILLIAM S. RICHARDSON, MASAJI MARUMOTO, KAZUHISA ABE, BERNARD H. LEVINSON, and BERT T. KOBAYASHI, or any one or more of them, acting individually or collectively, or by the Supreme Court of Hawaii, or by any one else, for the purpose of determining what these conditions are, whether their imposition is a valid exercise of authority by those purporting to impose these conditions, or whether these conditions would be met by August 1, 1971.

6.04 It affirmatively appears from the statement of Defendant MASAJI MARUMOTO (Exhibit "6") and from the statement of Defendant MATSUO TAKABUKI (Exhibit "4") that said MATSUO TAKABUKI has business and property interests that are deemed in conflict with the business and property interests of the Estate of Bernice Pauahi Bishop, deceased, but the exact nature and extent of these business and property interests have not been made public, and no procedure has been provided and no standards have been established by Defendants WILLIAM S. RICHARDSON, MASAJI MARUMOTO, KAZUHISA ABE, BERNARD H. LEVINSON, and BERT T. KOBAYASHI, or any one or more of them, acting individually or collectively, or by the Supreme Court of Hawaii, or by any one else, for the purpose of determining such conflicts of interest and eliminating the same.

6.05 The appointment and investiture of Defendant MATSUO TAKABUKI in the manner above alleged, without affording interested persons an opportunity to be heard has resulted in repugnance and hostility among

the trust beneficiaries, including these Plaintiffs, which will materially interfere with the operation of the said trust.

7.02 The provisions of article Fourteenth of the will of Bernice Pauahi Bishop, deceased, as presently applied, constitute an invalid attempt by private action to have judicial officers of the State of Hawaii exercise non-judicial functions and powers in a manner inconsistent with and in violation of the Constitution of the State of Hawaii and of the Constitution of the United States of America.

7.02 The exercise by the justices of the Supreme Court of the State of Hawaii, or by any one or more of them, of the power and authority originally conferred upon the justices of the Supreme Court of the Hawaiian Islands by said article Fourteenth, violates Canons 23 and 26 of the present code of judicial ethics heretofore adopted by the Supreme Court of the State of Hawaii, and the exercise of said power in the manner above alleged violates additionally Canons 4 and 17 of said Code.

7.03 The involvement of the justices of the Supreme Court of the State of Hawaii in the selection of the trustees under the will and of the estate of Bernice Pauahi Bishop, deceased, deprives persons, including Plaintiffs and each of them, who may be adversely affected by the actions of such trustees, of an impartial appellate tribunal, in violation of the due process and equal protection requirements of the Constitution of the State of Hawaii and of the Constitution of the United States of America.

7.04 The absence of procedural restraints and safeguards in the said selection of trustees in the manner above alleged, where the trust is so affected with a public interest, violates the constitutional rights of persons,

including Plaintiffs and each of them, who are or may be beneficiaries of the said estate or otherwise interested therein.

7.05 The failure and refusal of the justices of the Supreme Court of the State of Hawaii to permit or to provide for the participation of, or to grant a hearing to, interested persons, including Plaintiffs and each of them, in the process of selection of a trustee of a charitable trust which is affected with a broad public interest, such as the Estate of Bernice Pauahi Bishop, deceased, and the refusal of the Supreme Court of Hawaii to permit any meaningful review of such selection, is in violation of the due process and equal protection requirements of the Constitution of the State of Hawaii and of the Constitution of the United States of America.

7.06 The involvement of said justices of the Supreme Court of the State of Hawaii in the selection of trustees under the Will and of the Estate of Bernice Pauahi Bishop, deceased, denies to Plaintiffs and each of them the constitutional guarantee of a republican form of government.

7.07 The absence of, and the failure or refusal of the justices of the Supreme Court of the State of Hawaii, and of the Supreme Court, or provide for, a procedure whereby there may be participation by the public or by interested persons in the process of selection of a trustee of a charitable trust which is affected with a broad public interest, such as the Estate of Bernice Pauahi Bishop, deceased; the refusal of the Supreme Court of Hawaii to permit any meaningful review of such trustee's appointment; and the failure of this Court and the Attorney General of the State of Hawaii to safeguard, as above alleged, the rights and interests of Plaintiffs in such selection and appointment, effectively denies Plaintiffs and each of them of the right to petition the government for a redress of grievances and the right of access to the

courts, all in violation of the Constitution of the State of Hawaii and of the Constitution of the United States of America.

WHEREFORE, the Plaintiffs pray

(a) that this Court declare:

(1) that the appointment of a trustee under the Will and of the Estate of Bernice Pauahi Bishop, deceased is affected with a broad public interest, in that the decisions of the trustees with respect to matters of education at the Kamehameha Schools play a major role in the future well-being of the intended beneficiaries of the will and estate, and the decisions of the trustees with respect to the use and disposition of estate lands affect the lives and well-being of the people of Hawaii;

(2) that when an appointment is so affected with such a broad public interest, those members of the public whose lives will be touched by the appointment have a right, guaranteed by the Preamble to the Constitution of the State of Hawaii and by Article I, Sections 1,2,3, and 4, of that constitution, and by the First, Fifth, Ninth, Tenth, and Fourteenth Amendments to the Constitution of the United States of America to participate in a meaningful manner in that appointment process;

(3) that this Court, which has original jurisdiction over the administration of charitable estates, and the department of the attorney general, on their own initiatives or at the request of Plaintiffs have the right and duty to explore, fully and publicly, the qualifications of any person appointed to such an estate so affected with a public interest, and that this Court has the power to reject any such appointment that is not fully consistent with protection of the public interest;

(4) that the appointment at this time of any person, including Defendant MATSUO TAKABUKI, who has

no [sic] demonstrated special training, education, interest, and competence in the mode or modes of education that will further the educational opportunities of the intended beneficiaries of the trust estate frustrates the only express purpose of said will;

(5) that the appointment in the manner herein alleged of any person, including Defendant MATSUO TAKABUKI, to the said estate by the Supreme Court of Hawaii or by the justices thereof is inconsistent with canons of judicial ethics;

(6) that the appointment in the manner herein alleged of any person, including Defendant MATSUO TAKABUKI, to the said estate by the Supreme Court of Hawaii or by the justices thereof deprives the Plaintiffs and all other persons whose interests are or may be opposed to a legal position taken by the trustees of the said estate of an impartial appellate forum, in violation of the judicial article of the Constitution of the State of Hawaii, the due process and equal protection clauses of that Constitution, and the due process and equal protection clauses of the Constitution of the United States of America;

(7) that the assumption by the Supreme Court of Hawaii or by the justices thereof of the non-judicial power of appointment, in the case of an estate so affected with a public interest, violates the separation-of-powers doctrine of the Constitution of the State of Hawaii and the due process clause and guarantee of a republican form of government contained in the Constitution of the United States of America;

(8) that any attempt to withhold from this Court the power of review over the appointment of a trustee of the Bishop Estate deprives this Court of its statutory jurisdiction over such matters and is ineffective; and deprives these Plaintiffs, the beneficiaries of the estate

and the people of Hawaii of their rights under the Constitution of the State of Hawaii and the Constitution of the United States of America;

(b) that this Court appoint a master to begin an immediate investigation of whether or not the appointment of Matsuo Takabuki in consistent with the purposes of the said Will and the public interest, that the master be empowered to compel the production of witnesses and documents, that the master conduct public hearings at which any interested person may appear and testify as to matters that affect his interests, and that the master report his findings and conclusions to this Court at such time as may be ordered by this Court;

(c) as an alternative to paragraph (b) that this Court adjudge and hold void the appointment of Matsuo Takabuki, divest him of title to trust properties, and proceed with public hearings on the appointment of a successor to the said Herbert K. Keppeler;

(d) as an alternative to paragraphs (b) and (c) that this Court adjudge and hold void the appointment of Matsuo Takabuki, divest him of title to trust properties, and order Defendants WILLIAM S. RICHARDSON, MASAJI MARUMOTO, KAZUHISA ABE, BERNARD H. LEVINSON, and BERT T. KOBAYASHI as individuals to present this Court with a plan of a procedure for the appointment of a successor to the said Herbert K. Keppeler that affords members of the interested public with an adequate opportunity to participate in the appointment process; and

(e) such other and further relief as may to this Honorable Court seem fitting, proper and just.

DATED: Honolulu, Hawaii, August 4, 1971.

/s/ Thomas P. Gill
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Exhibit 1

**In the Matter of the Appointment
of a Trustee of the
BERNICE PAUAHI BISHOP ESTATE**

APPOINTMENT OF MATSUO TAKABUKI

(stamp)
Jul 10, 4 PM 1971
Samuel K. Makekau
Clerk Supreme Court

**In the Matter of the Appointment
of a Trustee of the
BERNICE PAUAHI BISHOP ESTATE**

WHEREAS, there now exists a vacancy in the office of trustee under the will and of the estate of Bernice Pauahi Bishop, deceased; and

WHEREAS, in an by said will it is provided that vacancies in the office of the trustees under said will and of said estate shall be filled by a majority of the justices of the Supreme Court of Hawaii;

NOW, THEREFORE, the undersigned justices of the Supreme Court of Hawaii, by virtue and in exercise of the

power for this purpose given to them in and by said will, do hereby appoint MATSUO TAKABUKI, of the City and County of Honolulu, State of Hawaii, a trustee under the will and of the estate of Bernice Pauahi Bishop, deceased, for a term to commence August 1, 1971 and to expire when the said MATSUO TAKABUKI attains the age of 70 years, unless sooner terminated.

IN WITNESS WHEREOF, the said undersigned have hereunto set their hand this 18th day of June, 1971.

/s/ William S. Richardson
/s/ Masaji Marumoto
/s/ Kazuhisa Abe
/s/ Bernard H. Levinson
/s/ Bert T. Kobayashi

(seal)
SUPREME COURT
SEAL
STATE OF HAWAII

Exhibit 2

"THE HAWAIIANS"
P.O. Box 210
Waimanalo, Hawaii 96795

April 6, 1971

The Honorable William S. Richardson
Chief Justice, Supreme Court
State of Hawaii
Honolulu, Hawaii 96813

Dear Chief Justice Richardson:

"The Hawaiians" is an organization vitally concerned with improving programs that are intended to benefit the Hawaiian people and in increasing the voice of the Hawaiian people in decisions that affect our destinies.

The operation of the Bishop Estate affects the eduction of our children. Decisions about the use to which Estate land is put affects many traditional Hawaiian values including, for some of us, even the ability to continue to live where our families have lived since Hawaiians first came to these Islands.

For these reasons, and also because we are generally interested in good government, we ask you for an opportunity to contribute to the Justices' decision on who should be the next trustee appointed to the Estate.

In particular, we respectively request:

(1) that we be given a list of the applicants for the position so that we may review qualifications with our members throughout the State to the end that the Hawaiian people may have an opportunity to make intelligent comments on who they think is most suited to fill the position;

(2) that after we have discussed the nominees with the people, we be given an opportunity to share their wishes with the Justices at a meeting.

Additionally, Mr. Chief Justice, we would very much appreciate hearing from you what characteristics, in your experience, constitute a good trustee for the Estate.

Thank you for considering our request and we look forward to your response.

LOKAHI A KUPAA

PAE GALDEIRA
President

Exhibit 3

SUPREME COURT OF HAWAII
ALIIOLANI HALE
HONOLULU

Chief Justice
WILLIAM S. RICHARDSON
Associate Justices
MASAJI MARUMOTO
KAZUHISA ABE
BERNARD H. LEVINSON
BERT T. KOBAYASHI

April 27, 1971

Dear Mr. Galdeira:

Thank you for your letter of April 6. I appreciate your interest in the appointment of a trustee for the Princess Bernice Pauahi Bishop Estate. Since the court does not operate in the manner which you suggest, it would be more appropriate if you assisted the court by submitting a list of those characteristics which you believe a trustee should possess, and a list of persons whom you think are qualified to serve as a trustee.

With kindest regards and

Aloha,

/s/William S. Richardson
Chief Justice

Mr. Pae Galdeira, President
THE HAWAIIANS
P.O. Box 210
Waimanalo, Hawaii 96795

Exhibit 4

Star Bull. 6/19/71

Takabuki Says He Didn't Seek Job

Matsuo Takabuki said today that he did not actively seek the Bishop Estate trusteeship, but was asked to consider taking the position.

"I did not file application for the trusteeship at all," he said, when reached by the Star-Bulletin for comment on his appointment.

He said, "It's really a great privilege and honor to be appointed.

"But at the same time," he said, "I am fully aware of the tremendous fiduciary responsibility placed upon me by this appointment to achieve the objectives and purposes under the will of Princess Pauahi Bishop.

"HOPEFULLY, together with the other trustees, I will be able to use whatever talents I have to fulfill this obligation."

Takabuki declined to comment on the adverse reaction of some Hawaiians to his appointment, but said, "I am willing to sit down with any group of people to listen to their ideas as to what would be best in achieving the ends set forth under the will."

He said he asked that he be given until Aug. 1 to assume his duties as a trustee.

"There are a lot of things on my end that I have to wind up first and this will give me time to obtain some basic information on the estate," he said.

He said he will have to "disengage" himself from his activities with Capital Investment Co. and other interests which might conflict with his position with the Bishop Estate.

Trusteeship Is Given to Takabuki
Continued from Page 1

meeting the needs and wishes of the Hawaiian people."

The five trustees of the Bishop Estate are not paid salaries but receive commissions.

DURING THE 1970 fiscal year the five received a total of $238,413 in commissions, distributed as follows:

Frank E. Midkiff–$50,933.
Keppeler–$54,483
Atherton Richards–$43,681
Richard Lyman–$43,133.
Hung Wo Ching–$45,983.

[Note: the above figures are illegible in the copy]

The new trustee is a graduate of Waialua High School and the University of Hawaii. He received his law degree from the University of Chicago in 1949.

During World War II, Takabuki served with the famed 442nd Regimental Combat Team.

He was first elected to the former City Board of Supervisors in 1952 and served for four terms before the name of the board was changed to the City Council.

Exhibit 5

A-8 Saturday, June 26, 1971 HONOLULU ADVERTISER

Isle justice clarifies trustee-naming process

By JAN TENBRUGGENCATE
Advertiser Staff Writer
Also see Page A-10

Associate Supreme Court Justice Masaji Marumoto yesterday said the appointment of Matsuo Takabuki to the Bishop Estate board of trustees requires no further approval from any judge.

But there's a catch.

ALTHOUGH Takabuki has been appointed and will carry the title of trustee effective Aug. 1, before he can actually carry out the duties of a trustee, the Bishop Estate property must be vested in his name by the probate judge, Yasutaka Fukushima.

Marumoto, in an interview with The Advertiser, said that portion of the will of Bernice Pauahi Bishop which deals with the appointment of a trustee to fill a vacancy on the board makes it clear the Supreme Court justices are solely responsible for such appointments.

That section of the will reads, "The vacancy shall be filled by the choice of the majority of the justices of the Supreme Court."

MARUMOTO SAID misunderstandings by some regarding the appointment process have resulted from the knowledge that most matters concerning the estate are handled by the probate judge.

"And when the will doesn't provide for the appointment of the trustees, it is handled by the probate judge," he said.

Of the several large estates in the Islands, only the Bishop Estate and the Lunalilo Estate call for appointment of trustees by the Supreme Court. All other trustee appointments are handled by the probate judge, he said.

Specifically in the case of the Bishop Estate, "except for the appointments, the affairs of the Bishop Estate are handled like any other estate—by the probate judge," Marumoto said.

IN CASES where trustees want to resign, it is up to the probate judge to determine that the estate's affairs are in order before allowing the resignation. This is because the trustees are personally responsible for the holdings and financial dealings of the estate, Marumoto said.

And in appointments, the probate judge must ascertain that the appointee is qualified to serve in the position as trustee.

Judge Fukushima was asked his opinion of the situation.

"I'm not talking to anyone about it," he said.

"Until the thing is determined, no one talks to me. After it's determined, then you talk to me." he said.

IF FUKUSHIMA denies the petition to vest the Estate's property in Takabuki it will most likely be appealed to the Supreme Court, Marumoto said.

The Supreme Court could then either sustain Fukushima's denial and have to appoint another trustee, or it could reject it and require Fukushima to vest the property in Takabuki, Marumoto said.

Asked what, in the final analysis, he feels will happen, Marumoto said:

"I don't think this will upset the appointment."

MEANWHILE, members of the Hawaiian community who met earlier this week at Kawaiahao Church are carrying on a campaign against Takabuki's appointment.

The most obvious display of their sentiments occurs

daily starting at 3 p.m. when a group marches around the Kamehameha I statue in front of Aliiolani Hale, the State Judiciary building.

One member of the marching, sign-carrying group said they were asked by the Kawaiahao pastor, the Rev. Abraham Akaka, to keep up the daily demonstration until their requests are met.

ASKED IF they have chosen anyone who they would like to take Takabuki's palce, the marching youth said:

"No, but if we're asked to come up with someone, we will."

Exhibit 6

A-11 Wed., June 30, 1971 HONOLULU ADVERTISER

Marumoto's statement on the appointment of Takabuki

Statement of Associate Justice Masaji Marumoto regarding the appointment of Matsuo Takabuki as a trustee of the Bishop Estate:

I make this statement as the senior associate justice of the Supreme Court of Hawaii participating in the appointment of Mr. Matsuo Takabuki as a trustee of the Bishop Estate. Chief Justice William Richardson, who is presently in Charleston, South Carolina, attending the Conference of Chief Justices, and the other associate justices have agreed that I make this statement.

I have done a great deal of soul searching since the hue and cry arose upon the announcement of Mr. Takabuki's appointment. My soul searching does not concern the appropriateness of my action in voting for the appointment but has to do with the appropriateness of speaking out on the matter.

A judge is supposed to have his action speak for itself, and say "no comment," if any question is asked about it. But here is a matter in which the very integrity of the justices is impunged. Implicit in the hue and cry was the innuendo that the Governor had something to do with the appointment. That innuendo did not remain as an innuendo but became an explicit charge when The Hawaii Tribune-Herald wrote on June 25, 1971, that the Governor "directed" the appointment. In the circumstance, I will break my silence.

WHEN THE CURRENT vacancy occurred, the Chief Justice and the associate justices made a study of possible candidates, those who had applied as well as those who had not, and each submitted his list of candidates at a meeting. A remarkable feature of this process was that no name on any justice's list was duplicated on another justice's list, thus showing clearly that there was no outside influence exerted on a group of justices. The next step was to take a vote on the candidates so named, and to eliminate the candidates who received only the vote of the sponsoring justice. After the field was narrowed down, the merits of the remaining candidates were discussed, and after such discussion Mr. Takabuki was unanimously chosen.

I have absolutely no question about Mr. Takabuki's integrity. I am also satisfied that Mr. Takabuki meets the religious qualification that a trustee be a Protestant.

Mr. Takabuki's feeling for the people too, I do not question. He is a product of the soil. He was born in Hawaii, raised and educated through his high school years in a multi-racial plantation community. At age 19, he volunteered to fight for his country. After an honorable and distinguished military service, by stint of his own labor and effort, he brought himself up to where he is today. He knows what it is to be poor. He knows the

value of education and motivation to one who has not been born with a silver spoon in his mouth.

I had a further reason for joining in the appointment of Mr. Takabuki.

MY INFORMATION is that when the Bishop Estate came into being on October 16, 1884, the approximate value of the estate was $400,000. The court records show that in 1916, the estate was valued at approximately $15,000,000. Today, it is my understanding that a conservative estimate of the value of the estate is in excess of $400 million.

This great increase in the value of the estate has been brought about by the wise provision, in the 17th paragraph of the codicil to the will, executed by Princess Bernice Pauahi Bishop on October 4, 1884, only 12 days before her death, which directed that the "trustees shall not sell any real estate, cattle ranches, or other property, but to continue and manage the same, unless in their opinion a sale may be necessary for the establishment or maintenance of said (Kamehameha) schools, or for the best interest of my estate."

The Bishop Estate presently owns nine percent, or approximately one-eleventh, of the total land area of the State of Hawaii, a very substantial portion of which consists of prime fee simple lands. In this situation, the trusteeship is affected with a broad public interest. The primary concern of the trustees, of course, is with the beneficiaries. But they also have a responsibility to the entire populace of the State in the maintenance of a fair land program.

THE VERY NATURE of the trusteeship requires that a trustee have a sympathetic understanding of the beneficiaries, not only of their material and educational needs but also of their emotional and psychological reactions and cravings, and, in addition, requires that a

trustee be knowledgeable in governmental, real estate, and business matters. In all of these respects, there is no doubt that Mr. Takabuki is eminently qualified, and will render a signal service to the trust and to the beneficiaries.

In connection with Mr. Takabuki's appointment, we have asked him to sever his lucrative legal practice and business associations, except a couple of real estate transactions which are in the process of completion. It is to settle these affairs that he requested us to postpone the effective date of his appointment to August 1, 1971. In accepting the trusteeship Mr. Takabuki is doing so in the prime of his life and at a considerable financial sacrifice to himself.

BEGINNING with the appointment of Mr. Hung Wo Ching as a trustee, the appointment of a Bishop Estate trustee is not for life but is limited to age 70. There is no pension in the trusteeship. A trustee may receive an annual commission of approximately $50,000, but, according to the 1970 tax rate schedules, the Federal and State income taxes for a married person filing a joint return will amount to about $21,000, so that the net after income taxes will be approximately $29,000. The cost of living being what it is at the present time, it will not be an easy matter for a trustee to build up an estate which will assure himself and his wife a life of retirement after age 70 at a level commensurate with their accustomed standard of living.

Finally, I may say that in the four years that I have served on the bench after being appointed by Governor Burns in May 1967, I have yet to see an instance where the Governor made even an attempt to influence or interfere with the prerogatives of the judiciary.

Exhibit 7

Hon. Star-Bulletin 6/29/71

Denies 'Influence'

High Court Judge Praises Takabuki

By Pierre Bowman
Star-Bulletin Writer

Associate State Supreme Court Justice Masaji Marumoto, in a rare public statement, today defended the court's appointment of Matsuo Takabuki to the Bishop Estate Board of Trustees.

Marumoto's written statement, given to the Star-Bulletin, said "a judge is supposed to have his action speak for itself and say 'no comment' if any question is asked about it."

But he defended the Takabuki appointment today, he said, because of an "explicit charge when the Hawaii Tribune-Herald wrote on June 25 that Gov. John A. Burns 'directed' the appointment."

Speaking for the entire Court, Marumoto said, "I have absolutely no question about Mr. Takabuki's integrity. I am also satisfied that Mr. Takabuki meets the religious qualification that a trustee be a Protestant."

HE SAID that in the selection of a trustee, each justice drew up a separate list of candidates.

Marumoto said there were no duplications of names from one list to another, "thus showing clearly that there was no outside influence exerted on a group of justices." (His statement did not say which justice proposed Takabuki.)

Defending Takabuki, Marumoto said the appointee has "feeling for the people" and "knows the value of education and the motivation to one who has not been born with a silver spoon in his mouth."

He said Takabuki possesses sympathetic understanding of the beneficiaries of the Bishop Estate and is eminently qualified as well in areas of government, real estate and business matters.

MARUMOTO also said Takabuki is accepting the appointment "at a considerable financial sacrifice to himself."

"We have asked him to sever his lucrative legal practice and business associations, except a couple of real estate transactions which are in the process of completion," Marumoto said.

Marumoto noted that a trustee receives about $50,000 annually in commissions, but said that with taxes it would be difficult for Takabuki to build up a retirement fund to provide him with the style of life to which he has become accustomed.

Takabuki would have to retire at age 70 under his appointment.

THE EDITORIAL in the Hilo paper that triggered Marumoto's comments today also "revoked the spirit of endorsement" it gave the Governor last fall.

In a telephone interview, the Star-Bulletin questioned Tribune-Herald general manager Leo Weilmann about the allegation that Burns "directed" Takabuki's appointment.

Weilmann said "I would say 'directed' in the sense that the Supreme Court justices are his appointees. I would say that 'directed' in that sense is a fair usage and that that's the intention we had."

Exhibit 8

S-B p. 2 Tuesday 6 Jul 71

Chief Justice Backs Marumoto
By Phil Mayer
Star-Bulletin Writer

William S. Richardson, Hawaii's chief justice, said today that he concurs in the statement issued last by Associate Justice Masaji Marumoto in which Marumoto discussed the court's appointment of Matsuo Takabuki as a trustee of the Bishop Estate.

Richardson said, "I approve the statement and its contents."

In his statement, Marumoto said that Court had not been influenced by Gov. John A. Burns in naming Takabuki: that Marumoto had "absolutely no question about Mr. Takabuki's integrity" and that "no name on any justice's list (of potential appointees) was duplicated on another justice's list."

Richardson emphasized it was Marumoto's personal comment statement and not a statement by or for the entire court.

He was asked if he or any other justices plan statements similar to Marumoto's. He replied, "no comment."

The chief justice was in Charleston, S.C., attending a meeting of all 50 states' chief justices when Marumoto made his statement.

He returned yesterday.

Richardson said that "as of now, I know of no requests from anyone or any group" to discuss Takabuki's appointment.

HE SAID, however that "names of many of the persons who were among the first to comment after the appointment were candidates for the post."

He continued, "They either nominated themselves or, perhaps without their knowledge were nominated by others.

"Before the appointment, each of us received many names persons wanted us to consider.

"And we automatically considered all those names–more than 60–who had been suggested in 1968"–for the trusteeship to which businessman Hung Wo Ching was named.

HE SAID that prior to the appointment of Takabuki, only one group of persons asked to meet with him to discuss the vacancy.

"And we met," he said, "But I don't know whether the group included official representatives of organizations or was just a group of private individuals."

But he would not comment further other than to note that he had received lists of nominees from both the Hawaiians and the Kamehameha Schools Alumni Association, although neither group asked for a meeting with him.

Exhibit 9

[A-4 Wed., July 7, 1971 HONOLULU ADVERTISER]

Richardson says race not considered
By JAN TENBRUGGENGATE
Advertiser Staff Writer

The chief justice of the Hawaii Supreme Court said yesterday that race had nothing to do with the selection of Matsuo Takabuki as a new Bishop Estate trustee, and

he said that race should not be the criterion in selection of trustees.

"I was just looking at who could do the best for helping the Hawaiian children. And I emphasize the young children because that's where they need the most help," said Chief Justice William S. Richardson in an interview with The Advertiser. Richardson is the only member of the Supreme Court with Hawaiian blood.

Richardson said that many of the persons who submitted their names for possible appointment to a Bishop Estate trusteeship made it clear they were Hawaiian or part-Hawaiian. But he said that wasn't what he and the other Supreme Corut justices were looking for.

ASKED ABOUT the heated protests which have arisen over the Supreme Court's appointment of attorney Matsuo Takabuki to the trusteeship, Richardson said:

"It's their right to have a viewpoint and to protest in support of it, but I don't want to comment on that. I can't separate my personal feelings from the rest of the members of the court."

Asked if being the only justice on the Supreme Court with Hawaiian blood makes him feel he is on a spot, Richardson again indicated he could not make a comment.

He strongly suggested, however, that in his opinion the protests are misdirected. He said he thinks the protests are aimed primarily at Section 14 of Princess Bernice Pauahi Bishop's will, which deals with the selection of trustees. The will named the original trustees—all of them white—and set out their powers. The only qualification was that there be five trustees on the board and that they all be Protestants. It did not say they had to be Hawaiian or part-Hawaiian.

Section 13 deals with what the trustees are to do with the Estate's assets and provides for the establishment of

the Kamehameha Schools for Boys and Girls and its maintenance.

BUT THERE IS another part of Section 13 of the will which Richardson said he feels the trustees have not fulfilled.

The section reads:

". . . to devote a portion of each year's income to the support and education of orphans, and others in indigent circumstances, giving preference to Hawaiians of pure or part aboriginal blood . . . I desire my trustees to provide first and chiefly a good education in the common English branches, and also instruction in morals and in such useful knowledge as may tend to make good and industrious men and women; and I desire instruction in the higher branches to be subsidiary to the foregoing objects."

IT IS THIS SECTION of the will that the Supreme Court justices were thinking about when they picked an Estate trustee, said Richardson. They wanted a person qualified to carry out the instruction in that particular section, he said, and they were not concerned with the racial background of the prospective trustee, just his qualifications to do that particular job.

The chief justice admitted, however, that he has been disappointed in the manner in which the Bishop Estate has set its priorities. He said he feels that the welfare of Hawaiian children has been neglected.

Asked how he would change the way the trustees are setting priorities and spending the Estate's money, he said:

"I would begin to look at doing something for the children in their early years–in elementary years. Specifically, for children in areas like Waimanalo, Nanakuli, Molokai and Keauhou on the Big Island."

HE SAID THE BISHOP ESTATE'S work should not be centralized in one area; rather, it should be spread out to where the Hawaiian children live.

Richardson said he himself did not go to Kamehameha Schools because it was too far from his home. "It was way across town," he said.

"We can't lose sight of the real purpose of the Estate—the education of youngsters," he continued.

"I propose this could be best done through assistance to a number of elementary schools. They might go to the school and say, 'We want to help you,' and send tutors to work with the kids before and after school and on vacations.

"Molokai is where they might have a little grammar school. There are quite a few Hawaiians there and that's where the kids need it," he said.

CARE FOR ORPHANS, as set forth in the will, is not too much of a problem among Hawaiians since it is a custom to care for the children of relatives if something happens to the parents.

In Hawaiian, a child who is cared for by persons other than his parents is called a "hanai," Richardson said. The Princess Bernice Pauahi herself was a "hanai."

The education of children who are indigents, however, is a problem and "in these areas we'd like to see them (the Estate) help out," said Richardson.

"In elementary school I think is where you make or break that kid. And if you can see that he gets the basics there, he'll be able to handle further education in any high school."

The executive board of the Oahu Education Association (OEA) has endorsed the idea that "an educator acceptable to the Hawaiian community" should be appointed to the Bishop Estate's board of trustees.

Exhibit 10

AD H[OC] COMMITTEE FOR HAWAIIAN TRU[ST]EE
c/o KAWAIAHAO CHURCH HONOLULU, HAWAII 96313
957 PUNCHBOWL STREET
PHONES 533-1427–533-6781

July 14, 1971

Bertram Kanbara, Esq.
Attorney General
Hawaii State Capitol
4th Floor
Honolulu, Hawaii 96813

Dear Mr. Kanbara:

Some twenty-two organizations have formed an ad hoc coalition to consider and take appropriate action with respect to the supreme court's appointment of Matsuo Takabuki as a Bishop Estate trustee.

Each of the organizations in the coalition, and the coalition itself, has as one of its purposes insuring that the purposes as well as the letter of Princess Bernice Pauahi's will are carried out.

We are concerned that the appointment of Mr. Takabuki may not be in the best interest of the beneficiaries of the trust. He has had extensive dealings in land and land development, and many of our members have expressed the concern that, as a trustee, he may be more inclined to further those interests and the interests of the friends and acquaintances he has made through those dealings than in furthering the education of the

Hawaiian people and in protecting the interests of Hawaiians now living on Bishop Estate land.

We understand that soon petitions will be filed in the circuit court in the Bernice Pauahi Bishop estate, the Bernice P. Bishop Museum Trust, and the Charles R. Bishop Trust, to have Mr. Takabuki invested as a co-trustee with title to the properties of these trusts.

On behalf of the beneficiaries and lessees of these estates who are members of our constituent organizations, as well as on behalf of the coalition, I request that you ask the circuit court not to act on these petitions until after you have made a full, public investigation of all of Mr. Takabuki's financial and personal relations that may have any bearing on his ability to serve the trust disinterestedly, and the court has had an opportunity to publicly review your findings so that it may render an informed decision on them.

You have, no doubt, been aware of this appointment and of our concern, so that the matter will not be an entirely new problem to you. You will appreciate also that time is short as the appointment of Mr. Takabuki is supposed to take effect on August 1, 1971. We read that you are resigning as Attorney General as of July 15, 1971. We would therefore respectfully ask that you let us know before you leave the office of Attorney General and in any event not later than noon on Monday, July 19, 1971, whether you or your successor will take the requested action.

Mahalo,

/s/ Curtis Kekoa
Chairman

Constituent Organizations:
Daughters and Sons of Hawaiian Warriors
Friends of Kamehameha Schools
Hale O Na Alii
Hawaiian Business-men's League
Hue Kukakuka
Kaahumanu Society
Kalihi-Moanalua Church
Kalihi-Palama Hawaiian Civic Club
Kamehameha Alumni Association
Kona Hawaiian Civic Club
Koolaupoko Hawaiian Civic Club
Liliuokalani Trust Interested Staff Members
Nanakuli Homestead, Inc.
Papakolea Community Association
Pearl Harbor Hawaiian Civic Club
Prince Kuhio Hawaiian Civic Club
The Hawaiians - Kauai Chapter
The Hawaiians - Maui Chapter
The Hawaiians - Oahu Chapter
Wahiawa Hawaiian Civic Club
Waianae Hawaiian Civic Club
The Hawaiians - State Board

Exhibit 11

ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
INITIALS AND NUMBER
BTK:my

CABLE ADDRESS
ATTGEN

BERTRAM T. KANBARA
ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HAWAII STATE CAPITOL
4th FLOOR
Honolulu, Hawaii 96813

July 15, 1971

Mr. Curtis Kekoa, Chairman
Ad Hoc Committee for Hawaiian Trustee
c/o Kawaiahao Church
957 Punchbowl Street
Honolulu, Hawaii 96813

Dear Mr. Kekoa:

This acknowledges receipt of you letter dated July 14, 1971, in which you request that I ask the Circuit Court not to act on petitions to be submitted by the Bernice

Pauahi Bishop Estate, the Bernice P. Bishop Museum Trust, and the Charles R. Bishop Trust to vest title to the properties of these trusts in Mr. Takabuki as a co-trustee until I have made "a full, public investigation of all of Mr. Takabuki's financial and personal relations that may have any bearing on his ability to serve the trust disinterestedly," and the court has had an opportunity to publicly review my findings.

Today being my last day in office, I am not in a position to respond to your request; nor can I speak for my successor in office.

However, speaking personally, may I state that I have known Mr. Takabuki for about 15 years. I know him to be a man of integrity and good judgment, of exceptional competence; particularly in the fields of finance, real estate and law, and of considerable vigor. Having had the privilege, as parens patriae, of working fairly closely with the trustees of the Bishop Estate, I now how important and necessary these qualities are. In the final analysis, each trustee must make his own judgments, often on the basis of inconclusive or conflicting evidence and expert advice. The trustees must deal with some of the most sophisticated financiers and businessmen in the country. A trustee with Mr. Takabuki's qualifications would be invaluable to the Estate.

It should also be kept in mind that the Bishop Estate is worth more than $400 million and consists of nearly 10 per cent of the land area of the State. Needless to say, the actions of the trustees affect virtually every person in the State in one way or another. I believe that Mr. Takabuki will prove to be an excellent trustee and will facilitate the achievement of the charitable purposes intended by Mrs. Bishop on behalf of her beneficiaries. He should perform

as capably as any of the 23 persons, both Hawaiians and non-Hawaiians, who have served as trustees.

I agree that Mr. Takabuki should divest himself of any interest that may conflict with his duties as trustee. I expect that this office will review this matter and submit its report and recommendations to the court at the appropriate time. If you know of any facts indicative of such conflict or of any other matter which would prevent the proper discharge of his duties as trustee, may I suggest that you submit the same in writing to this office.

I appreciate your concern and share your desire that the trust be capably administered to fulfill the charitable purposes envisioned by Princess Bernice Pauahi for her beneficiaries.

Very truly yours,

/s/Bertram T. Kanbara
BERTRAM T. KANBARA
Attorney General

Exhibit 12

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

KEVIN JAMES KEKOA, a minor by CATHERINE KEKOA ENOMOTO his next friend, et al,	) CIVIL NO. 34604) AFFIDAVIT OF CURTIS KEKOA
Plaintiffs,	)
vs.	)
WILLIAM S. RICHARDSON, et al	)
Defendants.	)

AFFIDAVIT OF CURTIS KEKOA

CURTIS KEKOA, being first duly sworn, deposes and says:

1. That he is a resident of Honolulu, State of Hawaii of part Hawaiian Ancestry, a graduate of Kamehameha Schools and his work is with the Air Force of the United States with the rank of Colonel.

2. That he is Chairman of the plaintiff, Ad Hoc Committee for a Hawaiian Trustee in proceedings of Kevin James Kekoa, et al vs. William S. Richardson, et al, Amended Complaint, Civil No. 34604.

3. That on Thursday afternoon, July 29, 1971, he conferred with Arthur K. Trask, Esquire, of counsel, in the said lawsuit and listened to the telephone communi-

cation of said Mr. Trask with purported defendant George T.H. Pai Acting Attorney General for the State of Hawaii which finally resulted in said Mr. Pai arranging a meeting with affiant in the office of the Attorney General at the State Capitol that same afternoon at 4 o'clock P.M. which appointment was kept and affiant did confer with the Acting Attorney General. Affiant further relates that Mr. Pai acknowledged the letter of affiant written July 14, 1971 (Exhibit 10) attached to the Complaint and also the letter by Attorney General Bertram Kanbara of July 15, 1971 in which affiant was given assurances that "this office will review this matter and submit its report and recommendations to the Court at the appropriate time"; that defendant Pai said that under the authority of Estate of Bishop 23 Haw. 573 an investigation into the validity of the appointment by "the majority of the Justices of the Supreme Court" was not within the official duties of the office of the Attorney General to perform. That Mr. Pai said that he concurred with the Honorable Circuit Judge Y. Fukushima that his duty was purely perfunctory and pro forma; so that accordingly, it was his opinion that the Office of the Attorney General of the State of Hawaii could not represent the Hawaiian People or anybody similarly situated in these proceedings concerning the appointment of a trustee and that he was prohibited by this authority from doing so, as much as the court.

Affiant further says it was the view of Mr. Pai in summary that the Hawaiian People "can't do very much".

DATED at Honolulu, Hawaii, this 3rd day of August, 1971.

/s/ Curtis Kekoa
CURTIS KEKOA

Subscribed and sworn to before
me this 3 day of August 1971.

[Signature illegible]
Notary Public, First Judicial
Circuit, State of Hawaii

My Commission Expires: 1/24/72

Exhibit 13

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

KEVIN JAMES KEKOA, a minor by CATHERINE KEKOA ENOMOTO his next friend, et al,	) CIVIL NO. 34604)) AFFIDAVIT OF) ARTHUR K. TRASK
Plaintiffs,	)
v.	)
WILLIAM S. RICHARDSON, et al,	)
Defendants.	)

AFFIDAVIT OF ARTHUR K. TRASK

ARTHUR K. TRASK, being first duly sworn, deposes and says:

1. That he is an attorney at law and licensed to practice law in all the courts of the State of Hawaii.

2. That he is "of Counsel" and representative of the Plaintiffs in the above entitled Complaint.

3. That on Thursday, July 29, 1971, he conferred with Defendant GEORGE T.H. PAI, Acting Attorney General of the State of Hawaii, and in behalf of the Plaintiffs, asked him for a copy of the "report" which his predecessor, BERTRAM KANBARA, ESQUIRE, in his letter of July 15, 1971, (Exhibit 11) attached to the

Complaint, assured Plaintiff CURTIS KEKOA who had written him by letter of July 14, 1971, (Exhibit 10) attached to the Complaint,

> "that this office will review this matter and submit its report and recommendations to the court at the appropriate time."

4. Defendant Pai said that there was no investigation made concerning the adequacy of defendant Matsuo Takabuki as Trustee under the Will of Bernice Pauahi Bishop so that no report was made by his predecessor Attorney General Bertram Kanbara, or himself; that although this fact was not communicated to plaintiff, Curtis Kekoa, it was determined by Bertram Kanbara, Esquire, who represented the Office of the Attorney General, specially, in these proceedings, and could not represent the plaintiff Curtis Kekoa, or other plaintiffs, similarly situated since the official duty of the Attorney General under the authority of the Estate of Bishop 23 Haw. 575 was pro forma and perfunctory.

Affiant further relates that to his question, as a practical matter, what can the Hawaiian People, or any interested party with a real and substantial question, do, if the Attorney General of the State of Hawaii will not represent them in these proceedings under the Petition for Vesting Order, since Judge Fukushima proclaimed last week that the Hawaiian People under the plaintiffs could not be represented by their attorneys but only by the Attorney General, and we find you, as the Attorney General, saying you cannot represent the Hawaiian People, or any people who feel that they are beneficiaries under the will of the Princess? Defendant Pai replied "I suppose they CAN'T DO VERY MUCH".

Affiant further relates that a few minutes before the hearing on Tuesday, July 27, 1971, at 11 o'clock A.M. before the Honorable Y. Fukushima in equity on the

"Petition for Vesting Order" of MATSUO TAKABUKI as Trustee, Equity No. 2048, Defendant Pai Acting Attorney General, in the presence of affiant, Approved the Vesting Order prayed for under said Petititon as aforesaid, and without any communication or notice to the plaintiffs herein or their counsel. Affiant and Allan S. Haley, Esquire, of counsel, in the hearing on the Petition for Vesting Order aforesaid, did seek to question the Honorable Masaji Marumoto, Associate Justice of the Supreme Court of Hawaii, and particularly under the Complaint herein and to participate in the hearing particularly with reference to questioning the Attorney General in reference to his report aforesaid, which was still a mystery but that the Honorable Circuit Judge maintained his position sustaining the Order of Dismissal of the Complaint and also denying the Motion for Intervention by the Plaintiffs.

DATED at Honolulu, Hawaii, this 3 day of August, 1971.

/s/Arthur K. Trask
ARTHUR K. TRASK

Subscribed and sworn to before me
this 4th day of August, 1971.

[Illegible]
Notary Public, First Judicial
Circuit, State of Hawaii

My Commission Expires: 2/14/72

Appendix D

1971 JUL 29 AM 11:18
/s/Y. Baba
Y. BABA
CLERK

1st Circuit Court
STATE OF HAWAII
FILED

Of Counsel
ANTHONY, WADDOUPS,
HODDICK & BROWN

ROBERT E. BROWN (129-0)
9th Floor, 333 Queen Street
Honolulu, Hawaii
Tel. No. 537-1941

Attorney for Petitioners.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

AT CHAMBERS	**IN EQUITY**
In the Matter of the Estate of BERNICE PAUAHI BISHOP, Deceased.	EQUITY NO. 2048 VESTING ORDER

VESTING ORDER

The petition of FRANK ELBERT MIDKIFF, ATHERTON RICHARDS, RICHARD LYMAN, JR. and HUNG

WO CHING, all of the City and County of Honolulu, State of Hawaii, herein filed on July 26, 1971, having come on duly to be heard on the 29th day of July 1971, representing that they are the surviving Trustees under the Will and of the Estate of Bernice Pauahi Bishop, deceased, who died on October 16, 1884, and whose will and two codicils thereto were admitted to probate by the Supreme Court of the Hawaiian Islands on December 2, 1884; that on the 18th day of June 1971, a majority of the Justices of the Supreme Court of Hawaii, under and by virtue of the power of appointment conferred on them by said will, appointed MATSUO TAKABUKI a trustee under said will and of said estate in succession to Herbert K. Keppeler, who died on March 18, 1971, for a term to commence on August 1, 1971 and to expire when said Matsuo Takabuki attains the age of 70 years, unless sooner terminated; and that it is necessary that the legal title in and to all of the property and assets of said trust estate be vested in said FRANK ELBERT MIDKIFF, ATHERTON RICHARDS, RICHARD LYMAN, JR., HUNG WO CHING and MATSUO TAKABUKI as trustees, jointly, upon the trusts provided by said will; and it appearing upon hearing of said petition that the allegations thereof are true, and good cause appearing therefor;

NOW, THEREFORE, IT IS HEREBY ORDERED that the title to all of the property and assets forming the trust estate of the said Bernice Pauahi Bishop, deceased, be and the same is hereby vested in the said FRANK ELBERT MIDKIFF, ATHERTON RICHARDS, RICHARD LYMAN, JR., HUNG WO CHING and MATSUO TAKABUKI, as Trustees under the Will and of the Estate of Bernice Pauahi Bishop, deceased, jointly, upon and subject to the trusts created by said will, effective as

of August 1, 1971, and subject to the expiration of the respective terms of said Hung Wo Ching and Matsuo Takabuki as such Trustees when either of them attains the age of 70 years unless sooner terminated;

AND IT IS FURTHER ORDERED that the said Frank Elbert Midkiff, Atherton Richards, Richard Lyman, Jr., Hung Wo Ching and Matsuo Takabuki, as Trustees under the Will and of the Estate of Bernice Pauahi Bishop, deceased, and as Trustees of the Charles R. Bishop Trust, shall file a bond covering the performance of their duties under both of said trusts in the sum of ONE HUNDRED THOUSAND DOLLARS ($100,000) with surety to be approved by this Court, ninety-five percent (95%) of the premium of which bond shall be paid out of the funds of the trust estate under the Will of Bernice Pauahi Bishop, deceased, and upon the filing of such bond the present bond of said surviving trustees shall be cancelled and the parties to the present bond shall be relieved from all further liability thereon occurring after the filing of the new bond herein required to be filed.

DATED: Honolulu, Hawaii Jul 29, 1971.

/s/[Illegible]
Presiding judge

Attest:
/s/ [Illegible]
Clerk

Approved as to form:

/s/ George Pai
Acting Attorney General
State of Hawaii

Appendix E

Provisions of United States Constitution:

Article III, Section 2: The Judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;–to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States, – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exception, and under such regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the

right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Ninth Amendment

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Tenth Amendment

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Statute:

HAWAII STATEHOOD - Pub. L. 86-3, Section 1, March 18, 1959, 73 Stat. 4. Section 1. That, subject to the provisions of this Act, and upon issuance of the proclamation required by section 7(c) of this Act, the State of Hawaii is hereby declared to be a State of the United States of America, is declared admitted into the Union on an equal footing with the other States in all respects whatever, and the constitution formed pursuant to the provisions of the Act of the Territorial Legislature of Hawaii entitled "An Act to provide for a constitutional convention, the adoption of a State constitution, and the forwarding of the same to the Congress of the United States, and appropriating money therefor", approved May 20, 1949 (Act 334, Session Laws of Hawaii, 1949), and adopted by a vote of the people of Hawaii in the election held on November 7, 1950, is hereby found to be republican in form and in conformity with the Constitution of the United States and the principles of the Declaration of Independence, and is hereby accepted, ratified, and confirmed.

Hawaii Constitution, Article V, Section 2: The supreme court shall consist of a chief justice and four associate justices. When necessary, the chief justice shall assign a judge or judges of a circuit court to serve temporarily on the supreme court. As prescribed by law, retired justices of the supreme court also may serve temporarily on the supreme court at the request of the chief justice. In case of a vacancy in the office of chief justice, or if he is ill, absent or otherwise unable to serve, an associate justice designated in accordance with the rules of the supreme court shall serve temporarily in his place.

Hawaii Statutes:

Hawaii Rev. Stat. §554-1: Vesting title to trust estates. In the case of the valid appointment or succession of any trustee to fill a vacancy in any trusteeship, whether the vacancy is caused by death, removal, or otherwise, any circuit judge sitting in equity at chambers and having jurisdiction over the subject matter of the trust, may make a vesting order which shall vest the legal title in and to the trust property situate in the State in the the trustee so appointed or succeeding, subject to the trust, solely, unless there be a cotrustee or cotrustees as the case may be jointly.

Hawaii Rev. Stat. §554-8: Charitable trusts; expenses. In any proceedings, in any court, concerning a trust, which is wholly or partly charitable and in which the attorney general has been cited by the court or trustees as a necessary or proper party, the court having jurisdiction of such proceedings may require the payment of all reasonable and necessary expenses incurred by the attorney general for the protection of the beneficial interest in, or for the proper conduct of, such proceedings from the corpus or income, or both, of the trust estate, in such reasonable amounts as the court may order.

* * * * *

Hawaii Rev. Stat. §602-12: Disqualification or absence of all justices; substitute justices. If all of the justices of the supreme court are disqualified from sitting in any cause pending before the supreme court, or are unable to attend from sickness, accident, absence, or any other reason, their places for the trial and determination of the cause shall be filled by circuit judges who have had no

connection with the cause either as counsel or in an official capacity, who are not otherwise disqualified, and who are not unable to attend from sickness, accident, absence, or any other reason as authorized by the chief justice.

Hawaii Rev. Stat. §603-22: Circuit judges at chambers. The judges of the several circuit courts shall have power at chambers or as family courts within their respective jurisdictions, but subject to appeal to the circuit and supreme courts, according to law, as follows:

. . .

(3) To grant probate of wills, to appoint administrators and guardians, and to compel executors, administrators, and guardians to perform their respective trusts and to account in all respects for the discharge of their official duties; to remove any executor, administrator, or guardian; to determine the heirs at law of deceased persons and to decree the distribution of intestate estate.

* * * * *

Appendix F

Excerpts from the Will of Bernice Pauahi Bishop, Deceased.

Paragraphs –

Thirteenth. I give, devise and bequeath all of the rest, residue and remainder of my estate real and personal, wherever situated unto the trustees below named, their heirs and assigns forever, to hold upon the following trusts, namely: to erect and maintain in the Hawaiian Islands two schools, each for boarding and day Scholars, one for boys and one for girls, to be known as, and called the Kamehameha Schools. I direct my trustees to expend such amount as they may deem best, not to exceed however one-half of the fund which may come into their hands, in the purchase of suitable premises, the erection of school buildings, and in furnishing the same with the necessary and appropriate fixtures, furniture and apparatus. I direct my trustees to invest the remainder of my estate in such manner as they may think best and to expend the annual income in the maintenance of said schools: meaning thereby the salaries of teachers, the repairing [of] buildings and other incidental expenses; and to devote a portion of each years income to the support and education of orphans, and others in indigent circumstances, giving the preference to Hawaiians of pure or part aboriginal blood; the proportion in which said annual income is to be divided among the various objects above mentioned to be determined solely by my said trustees they to have full discretion. I desire my trustees to provide first and chiefly a good education in the common English branches, and also instruction in morals

and in such useful knowledge as may tend to make good and industrious men and women, and I desire instruction in the higher branches to be subsidiary to the foregoing objects. For the purposes aforesaid I grant unto my said trustees full power to lease or sell any portion of my real estate, and to reinvest the proceeds and the balance of my estate in real estate, or in such other manner as to my said trustees may seem best. I also give unto my said trustees full power to make all such rules and regulations as they may deem necessary for the government of said schools and to regulate the admission of pupils, and the same to alter, amend and publish upon a vote of a majority of said trustees.

I also direct that my said trustees shall annually make a full and complete report of all receipts and expenditures, and of the condition of said schools to the Chief Justice of the Supreme Court, or other highest judicial officer in this country; and shall also file before him annually an inventory of the property in their hands and how invested, and to publish the same in some Newspaper published in said Honolulu; I also direct my said trustees to keep said school buildings insured in good Companies, and in case of loss to expend the amounts recovered in replacing or repairing said buildings. I also direct that the teachers of said schools shall forever be persons of the Protestant religion, but I do not intend that the choice should be restricted to persons of any particular sect of Protestants.

Fourteenth. I appoint my husband Charles R. Bishop, Samuel M. Damon, Charles M. Hyde, Charles M. Cooke, and William O. Smith, all of Honolulu, to be my trustees to carry into effect the trusts above specified. I direct that a majority of my said trustees may act in all cases and may convey real estate, and perform all of the duties

and powers hereby conferred; but three of them at least must join in all acts. I further direct that the number of my said trustees shall be kept at five; and that vacancies shall be filled by the choice of a majority of the Justices of the Supreme Court, the selection to be made from persons of the Protestant religion.

COURT, U. S.

APR 22 1974

MICHAEL RODAK, JR., CLE

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1402

KEVIN JAMES KEKOA, *et al.*,

Petitioners,

vs.

WILLIAM S. RICHARDSON, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF FOR RESPONDENT GEORGE T. H. PAI, ATTORNEY GENERAL OF THE STATE OF HAWAII, IN OPPOSITION

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BRIEF FOR RESPONDENT GEORGE T. H. PAI, ATTORNEY GENERAL OF THE STATE OF HAWAII, IN OPPOSITION

ARGUMENT

The Petition for Writ of Certiorari presents no federal question of substance warranting further review, Rule 19 of this Court, and should be denied.

The material facts are simple and clearly bespeak the insubstantiality of Petitioners' contentions:

> By her will, Bernice Pauahi Bishop established a charitable trust for educational and other benevolent purposes. Mrs. Bishop died in 1884. With respect to the appointment of trustees, she provided in Article Fourteenth of her will as follows:
>
> "I further direct that the number of my said trustees shall be kept at five; and that vacancies shall be filled by the choice of a majority of the Justices of the Supreme Court, the selection to be made from persons of the Protestant religion."
>
> Trustee Herbert K. Keppeler died on March 18, 1971. In accordance with Article Fourteenth of Mrs. Bishop's will, on June 18, 1971 the Justices of the Supreme Court of Hawaii appointed Matsuo Takabuki to fill the vacancy. There has been no indication that Mr. Takabuki is not fully qualified to serve.

The Petitioners assert that the Justices should have held a public hearing before making the appointment,[1] and that in not doing so, they somehow violated the proscription in the Fourteenth Amendment to the U. S. Constitution that no State shall "deprive any person of life, liberty, or property, without due process of law."

---

[1] Although the Justices declined to hold a public hearing, they did invite interested persons to submit suggestions as to qualifications which they believe a trustee should possess and names of persons whom they think are qualified to serve as trustee. (Petition, App. C, Ex. 3, p. 26c)

1. ***Petitioners Have Not Shown That They Have Been Deprived of Any Liberty or Property Within the Meaning of the Fourteenth Amendment.***

It is elementary that a deprivation of life, liberty or property must be shown before the due process clause of the Fourteenth Amendment may be invoked. Obviously no deprivation of life or liberty is involved. Petitioners claim deprivation of liberty and property, but nowhere do they specify such "liberty" or "property". See the opinion of the Supreme Court of Hawaii. (Petition, App. B, p. 6b) Petitioners do speak of having been denied "the liberty of any common citizen: the right to participate in the deliberations that affect him". (Petition, 18)

However, in the very next paragraph they contradict this by acknowledging that: "Petitioners, be it understood, do not contend that due process is denied whenever a trustee is appointed without affording interested parties, including beneficiaries, an opportunity to be heard". (Petition, 19)

Moreover, Petitioners confuse the "process" for the right which is being protected. Participation in deliberations is procedural. It is not a right, the deprivation of which can be accomplished only by according due process. Petitioners are placing the proverbial cart before the horse.

The same is true of Petitioners' further "narrower" contention that "whenever the Supreme Court of a state is involved in the appointment procedure, considerations of fundamental fairness and due process require that it adhere to standards applicable to any other court, or coordinate branch of government: that it afford interested parties the opportunity to be heard before it takes action" and that such action be subject to review in a court of equity. (Petition, 19) This contention is faulty on several counts:

(1) As stated above, it confuses the "process" for the right;

(2) It simply is not true that the Constitution requires that a court or agency of any coordinate branch of government hold a hearing before it makes an appointment. Presidents, governors, mayors and others in the executive and legislative branches appoint numerous persons to fill important public positions. Courts appoint masters, referees, administrators and other officers. We have not found any constitutional requirement, and Petitioners can cite none, of a public hearing as a prerequisite to appointment; and

(3) With respect to review by a court of equity of the appointment of a trustee, if Petitioners are contending that a court of equity may substitute its judgment for that of the Justices as to the worthiness or fitness of an appointee, Petitioners would be rewriting Mrs. Bishop's will and contravening her specific intent that the *Justices* fill the vacancy.

The only other reference to a right of which they are allegedly being deprived is a casual off-hand reference to "the obvious equitable interests that the beneficiaries have in a trust (i.e., a property interest)". (Petition, 18) In this connection, it should be noted that a charitable trust by its nature has beneficiaries who are not definite and ascertainable, 4 Scott, *Trusts* (2d ed. 1956), sec. 364. Here, the number of current and potential beneficiaries is enormous, and the views of a beneficiary or a potential beneficiary may not be the same as that of other beneficiaries or potential beneficiaries. For these, as well as historical, reasons, it is well-established that the Attorney General, as *parens patriae,* is the proper party to bring action to enforce a charitable trust. Bogert, *Trust and Trustees* (2d ed.), sec. 414, p. 340.

In this instance, the Attorney General of the State of Hawaii had been requested to consider contentions of the type raised by Petitioners but had found no evidence that the appointment procedure was faulty or that the candidate was not qualified. Accordingly, he declined to interfere with

the exercise of the power of appointment by the Justices. (Petition, 6)

Finally, Petitioners concede that authority in support of their extraordinary contentions "is not to be found in the reports of cases" and are constrained to acknowledge that "[n]o amount of sophisticated analysis will reveal the 'liberty' or 'property' which has been denied to Petitioners . . ." (Petition, 20) We agree that their contentions are without merit.

2. *The Appointment of a Successor Trustee for the Bishop Estate Did Not Constitute State Action.*

Petitioners' failure to show that they had been deprived of liberty or property within the meaning of the Fourteenth Amendment renders immaterial the question of whether or not State action was involved. Nonetheless, we shall address ourselves to this question since Petitioners have placed so much emphasis on it.

The injunction of the Fourteenth Amendment is directed against State action. In *Estate of Bishop,* 23 Haw. 575, 581-82 (1917), *aff'd,* 250 F 145, 149-50 (9th Cir. 1918), Article Fourteenth of Mrs. Bishop's will was authoritatively interpreted as delegating the power of appointment to the Justices not as a court, but as individuals. See *Estate of Carter,* 24 Haw. 536, 538-39; *Kekoa* v. *Supreme Court of Hawaii,* ——— Haw. ———. (Petition, App. B) None of the State-action cases cited by Petitioners is apposite.

There being no State action, the Fourteenth Amendment does not apply. Moreover, even if the trustee selection process were to be regarded as State action, the Fourteenth Amendment has not been violated because, as explained above, Petitioners have not been deprived of life, liberty or property.

3. *Petitioners Have No Constitutional Right to Designation of Substitute Justices by Lot.*

Petitioners' contention that failure of the Chief Justice to designate substitute Justices by lot denied Petitioners due process is clearly without merit. The Chief Justice and associate Justices of the State Supreme Court properly recused themselves. The Chief Justice then assigned judges of the State circuit courts to serve as substitute Justices, in accordance with the sole procedure prescribed therefor by the Hawaii State Constitution, Article V, section 2. Clearly, Respondents have no constitutional right to have substitute Justices selected by lot.

There has been no showing that the manner of assignment of substitute Justices was improper or that the substitute Justices were biased. On the contrary, they issued a carefully reasoned, thorough and scholarly opinion. The opinion clearly reveals the lack of merit in Petitioners' position. It also shows the absence of any substantial federal question warranting further review. (See Petition, App. B)

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

DATED: Honolulu, Hawaii, April 18, 1974.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that three copies of this Brief in Opposition were served upon EDWARD C. KEMPER, Suite 1401, 841 Bishop Street, Honolulu, Hawaii 96813, attorney for Petitioners, by mailing the same to him postage prepaid, this date. Three copies each of this Brief were also mailed to WALTER G. CHUCK, Suite 202, 1022 Bethel Street, Honolulu, Hawaii 96813, attorney for Respondents Richardson, Marumoto, Abe, Levinson and Kobayashi, and J. GARNER ANTHONY, 9th Floor, 333 Queen Street, Honolulu, Hawaii 96813, attorney for the Respondent Trustees of the Bernice P. Bishop Estate.

Honolulu, Hawaii, April 18, 1974.

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Attorney General of the
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In the Supreme Court of the United States

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BRIEF FOR RESPONDENTS WILLIAM S. RICHARDSON, MASAJI MARUMOTO, KAZUHISA ABE, BERNARD H. LEVINSON, and BERT T. KOBAYASHI, individually and in their capacity as JUSTICES of the SUPREME COURT OF HAWAII, IN OPPOSITION

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QUESTIONS PRESENTED

I

Whether Petitioners are beneficiaries of the Bishop Estate and thus have standing to Petition for a Writ of Certiorari to review the appointment of a successor trustee to the Bishop Estate?

II

Whether Petitioners have any liberty or property which has been deprived within the meaning of the due process clause of the Fourteenth Amendment?

III

Whether the appointment process of successor trustees to the Bishop Estate constitutes state action?

IV

Whether the Chief Justice's appointment of substitute Justices from among the State's circuit court judges under the sole procedure provided by the Hawaii State Constitution violated Petitioners' right to due process under the Fourteenth Amendment?

COUNTER-STATEMENT OF FACTS

By her will, Bernice Pauahi Bishop (hereinafter "Mrs. Bishop") who died in 1884, created a charitable trust (hereinafter "Bishop Estate") out of the remainder of her estate "to erect and maintain in the Hawaiian Islands two schools, . . . one for boys and one for girls, to be known as the Kamehameha Schools."

The Bishop Estate's annual income was to be used to maintain the schools. A portion of each year's annual income, the amount of which was in the trustees' sole and full

discretion, was to be devoted to the "support and education of orphans, and others in indigent circumstances, giving the preference to Hawaiians of pure or part aboriginal blood."

Successor trustees to the Bishop Estate were to be appointed "by the choice of a majority of the Justices of the Supreme Court." On March 18, 1971, Herbert K. Keppler, a Bishop Estate trustee, died. On June 18, 1971, the Justices of the Supreme Court of Hawaii appointed Matsuo Takabuki (hereinafter "Mr. Takabuki") to fill the vacancy created by Mr. Keppler's death.

Petitioners, proclaiming themselves to be beneficiaries of the Bishop Estate, instituted suit to void Mr. Takabuki's appointment or to cause a master to be appointed to investigate the appointment. Petitioners asserted, among other things, that the appointment process violated the due process clause of the Fourteenth Amendment to the United States Constitution because the appointment process fails to provide notice and an opportunity to be heard to interested parties. Although the Complaint and Amended Complaint filed by Petitioners questioned Mr. Takabuki's qualifications to serve, Petitioners, in response to the communications from the Chief Justice and from the Attorney General, (Exhibits "3" and "11" to Appendix "C") have failed to submit any evidence indicating that Mr. Takabuki is not qualified to serve as a Bishop Estate trustee.

ARGUMENT

Respondents join in the Brief in Opposition filed for the Respondent George T. H. Pai, Attorney General of the State of Hawaii, and hence will discuss only questions I and III under the Questions Presented for Review.

Respondents' Brief in Opposition will not discuss all of the points covered in the Petition, but will only cover those points which relate or involve certain local matters. Respondents at this time will not discuss the decisions of the Su-

preme Court of the United States raised in the Petition because this Court is undoubtedly aware of those decisions and their inapplicability to the facts and circumstances of this case. Silence as to other points should not be construed as an assent to the other issues raised by the Petition.

I. This Court Should Not Grant the Petition to Resolve the Local Issue of Whether Petitioners Have Standing to Review the Appointment of Successor Trustees to the Bishop Estate.

Petitioners state that they are the beneficiaries and potential beneficiaries of the Bishop Estate. Such a conclusory assumption ignores a basic and yet unresolved question as to who is a beneficiary of the Bishop Estate with the right to institute litigation.

By definition, a charitable trust lacks definite and ascertainable beneficiaries. Thus, the Attorney General, the representative of the people, is charged with the responsibility for the enforcement and supervision of charitable trusts. 4 Bogert, *Trusts & Trustees* (2d ed.), §414. In certain factual circumstances, persons with a "special interest" have been granted standing to enforce a charitable trust. *Bogert, id.* In New Jersey, the inadequate enforcement and supervision of charitable trusts by the Attorney General as a matter of public policy led the court to liberalize its standing requirements with respect to the enforcement of charitable trusts. *City of Palerson v. Palerson General Hospital,* 97 N.J. Super 514, 235 A.2d 487 (1967).

This Court should not resolve the local issue of whether the Petitioners have a "special interest" in the Bishop Estate or whether the enforcement and supervision of the Bishop Estate by the Attorney General in Hawaii is inadequate.[1] The issue of Petitioners' standing to litigate the appointment of a successor trustee to the Bishop Estate is and should remain a matter for resolution by the appropriate state court.

---

[1] This is particularly true since Petitioners declined to submit any evidence to the Attorney General indicating that Mr. Takabuki was not qualified to be a successor trustee.

III. The Appointment of Successor Trustees to the Bishop Estate Does Not Involve State Action.

A. *Section 554-1 Hawaii Revised Statutes.*

The Petition argues that the Justices are acting in their capacity as the Supreme Court of the State of Hawaii in appointing successor Bishop Estate trustees because under *Estate of Bishop,* 23 Haw 575, (1917), *aff'd.,* 250 F. 145 (9th Cir. 1918) the circuit court judge does not have the authority which he would otherwise possess under §554-1 *H.R.S.* to refuse to enter an order vesting title to the trust property in the name of all the trustees, including the newly appointed trustees.

Petitioners mis-construe §554-1 *H.R.S.*

Statutes like §554-1 *H.R.S.* were not designed nor enacted to grant a court of equity discretionary authority to refuse to confirm or to remove a lawfully appointed trustee. Equity courts, because they acted in personam, had no direct means of vesting legal title to the trust property in the successor trustee. A court of equity could only order the remaining trustees to convey the trust property to the new trustee and punish the remaining trustees if they failed to comply. If there were no remaining trustees or if the remaining trustees had a legal disability like insanity, further difficulties in vesting title to the successor trustee were encountered. Statutes like §554-1 *H.R.S.* were designed to remove these kinds of difficulty and inconvenience of vesting title to the trust property in the successor trustee by providing that the court may by its own decree vest legal title to the trust property in the successor trustee. See 2 *Scott on Trusts* (3d ed.) §110.

The words "may make a vesting order" in §554-1 *H.R.S.* were not intended and do not grant discretionary authority to the circuit judge to choose or refuse to approve the newly appointed trustee, but only to prevent the statutory interpretation that other methods of vesting legal title to the trust property in the new trustee were repealed by impli-

cation by the enactment of §554-1 *H.R.S.* This is particularly true since §554-1 *H.R.S.* relates only to trust property situate within the State of Hawaii. Thus, if the trust owned property situate both within and outside of the State of Hawaii, the circuit judge may order the remaining trustees to convey legal title to the new trustee rather than entering a vesting order under §554-1 *H.R.S.* which would include only the trust property situate within the State of Hawaii.

The Petition not only misconstrues §554-1 *H.R.S.*, but also misstates the holding in *Estate of Bishop, supra.* In *Estate of Bishop,* 23 Hawaii 575, 583, the Supreme Court of the State of Hawaii held that the circuit judge did not have the discretionary authority to refuse to confirm the appointment of a successor trustee to the Bishop Estate because Mrs. Bishop's Will did not make the appointment subject to his approval or consent, and not because the appointment of a successor trustee is a judicial act of the Hawaii Supreme Court as stated in the Petition. This holding is consistent with the general trust law that the court lacks discretionary authority to prevent, modify or substitute the settlor of a trust's manner of appointing successor trustees. See 2 *Scott on Trusts* (3rd ed.), §§108.2, 108.3; 5 Bogert, *Trusts & Trustees* (2d ed.), §532; *Raffety v. Parker,* 24 1F.2d 594, 611-612 (8th Cir. 1957); and *In Re Estate of Beckwith v. Cooper,* 258 Ill. App. 411, 417 (1930).

B. *The fact that the individuals appointing successor trustees are Justices of the Supreme Court of the State of Hawaii does not make appointing act state action.*

Petitioners argue at great length that the appointors of successor trustees to the Bishop Estate are identified only by their state position and that they serve as appointors only while they occupy that state office.

Reflection reveals that the only manner that Mrs. Bishop could identify the "individuals" that she desired to appoint successor trustees to the Bishop Estate was by identifying

the offices and positions that were held by the individuals. The Bishop Estate was intended by Mrs. Bishop to endure into perpetuity and not to terminate within the lives of those individuals whom she knew and could identify by surname. Thus, Mrs. Bishop had no alternative manner by which she could identify and describe those individuals she desired to appoint successor trustees except by their office and their respective positions in that office.

The fact that the Justices lose their power to select successor trustees upon termination of office is likewise not significant. If the power to appoint continued after the Justices left office, the power would terminate upon the demise of the individual Justices. However, if the power to appoint were granted to the individuals who occupy the office only while they occupy the judicial office, the appointive power continues until the office is abolished. Since Mrs. Bishop envisioned that the Bishop Estate continue in perpetuity, she wanted the appointive power to likewise continue in perpetuity and not die with the individual named Justice possessing the same.

C. *Appointive document not determinant of state action.*

The Petition stresses several times that the document appointing Mr. Takabuki trustee is in the form of a court order, is impressed with the court's seal, is stamp filed by the clerk of the Supreme Court, and is retained in the files of the Supreme Court.

These incidents are argued to give the appearance that a state act has occurred in the appointment of a successor trustee to the Bishop Estate. These very same incidents are, however, necessary evidence that the proper persons under Mrs. Bishop's Will appointed the successor trustee.

Petitioners' arguments on this point lack merit for another reason. The substantive appointive act would not be changed by the removal and discontinuance of these prac-

tices, and the decision as to whether the appointment process is a state act should not depend upon such a transparent legal basis.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

DATED: Honolulu, Hawaii, May 17, 1974.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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the Supreme Court of Hawaii.